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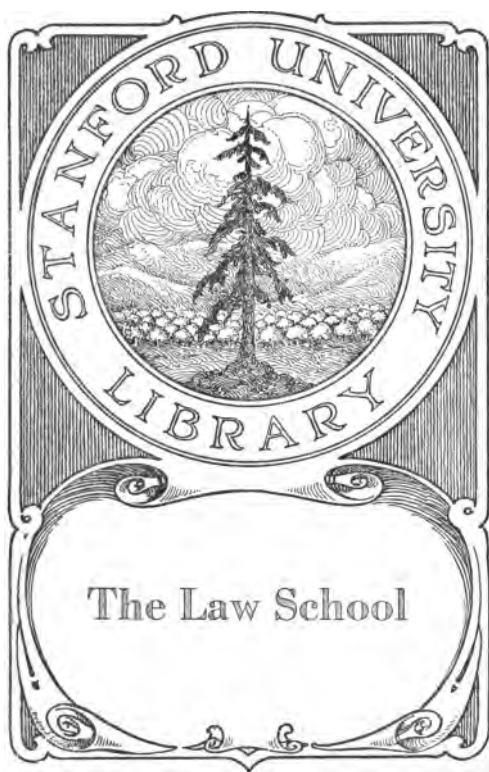
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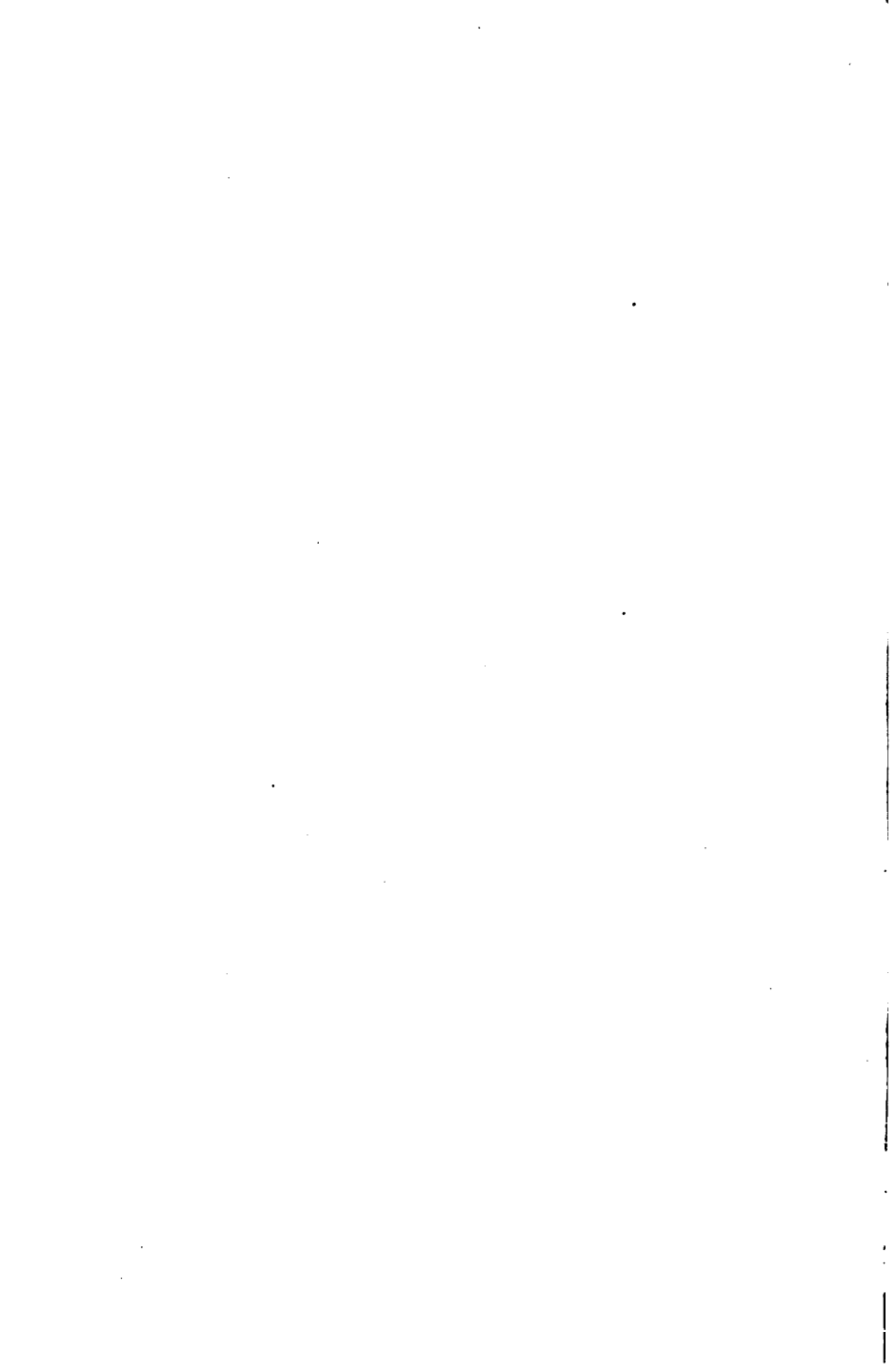
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XIX



## **LAW IN DAILY LIFE**

**HENRY FROWDE, M.A.**  
**PUBLISHER TO THE UNIVERSITY OF OXFORD**  
**LONDON, EDINBURGH**  
**NEW YORK**

# LAW IN DAILY LIFE

A COLLECTION OF LEGAL QUESTIONS  
CONNECTED WITH THE ORDINARY  
EVENTS OF EVERYDAY LIFE

FROM THE GERMAN OF  
RUD. VON JHERING

WITH NOTES AND ADDITIONS

By HENRY GOUDY, D.C.L.

REGIUS PROFESSOR OF CIVIL LAW IN THE UNIVERSITY OF OXFORD

OXFORD  
AT THE CLARENDON PRESS

1904

OXFORD  
PRINTED AT THE CLARENDON PRESS  
BY HORACE HART, M.A.  
PRINTER TO THE UNIVERSITY

L 3808  
MAY 19 1931

Y. A. 981. 0307. 1931



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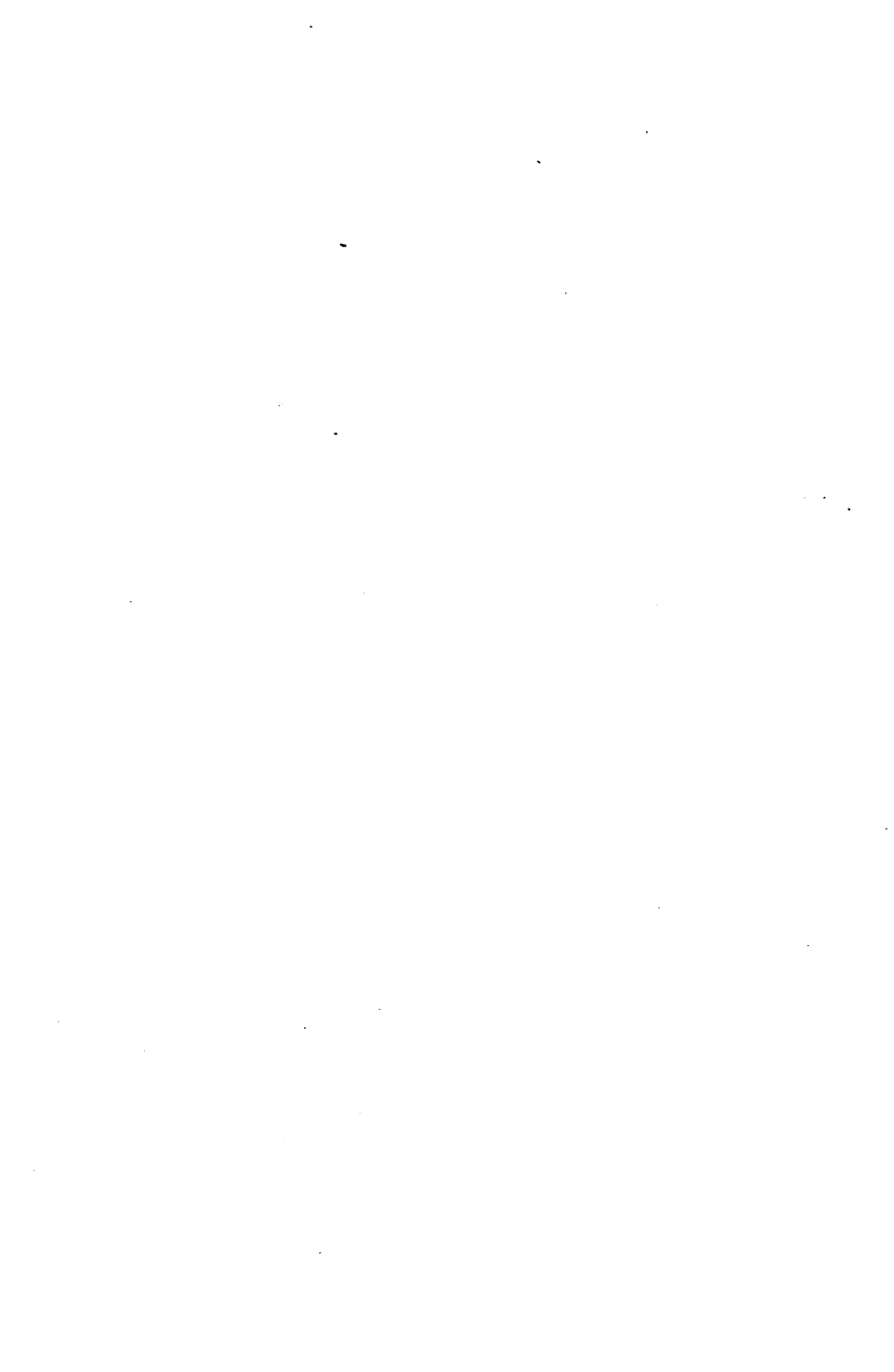
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**EDINENSI PROFESSORI**

**HAEC TRANSLATIO IN MEMORIAM**

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## AUTHOR'S PREFACE

### TO THE EIGHTH ENLARGED EDITION

IN daily life many legal relations and legal transactions arise which, owing to the insignificance of the object involved in them, hardly ever lead to an action, but which for all that may be applied with great utility to purposes of legal education, because they give to beginners the opportunity of contemplating with a legal eye the ordinary occurrences of life. I have collected a great number of cases of this nature and arranged them together from various points of view. The collection first appeared as an appendix to the second edition of my 'Civilrechtsfälle ohne Entscheidungen,' published in the year 1870, and then independently; and its value for teaching purposes has been proved by the new editions which have since made their appearance, and by several translations (an Italian by Vito Perugio, a Hungarian by Professor Biermann, a Greek by Dr. Demaras, an abridgement in the Portuguese tongue in De Menezes, *Questões vigentes de philosophia e de direito*, Pernambuco, p. 161 sq.). May the little book still further prove its usefulness for legal education.

THE AUTHOR.

GÖTTINGEN,

August 22, 1891

## TRANSLATOR'S PREFACE

THE translation of this little work of Von Jhering occupied some of my leisure hours during last summer vacation. Several reasons concurred in inducing me to undertake it. In the first place, it seemed to me desirable that as far as possible the fertile legal ideas of this eminent jurist—probably the greatest Romanist of last century next to Savigny—should be made easily accessible to English readers. It is a matter of regret that his '*Geist des römischen Rechts*' has not hitherto been translated into our tongue, and I trust that some one interested in Roman Law may ere long undertake it. Secondly, the practical utility of the present work commended itself to me. It will be found useful for the teaching and study of law as well as for examination purposes. In teaching law at the Universities the combination of practical illustrations (casuistic) with exposition of the theoretical doctrines (dogmatic) is generally admitted to be of prime importance. To divorce the theoretical from the practical is to deprive the study of law of a great deal of its charm, and, in fact, tends to make it repellent to beginners. Jhering himself has, in the preface to his '*Civilrechtsfälle ohne Entscheidungen*' (2nd ed., 1870), insisted upon this in the strongest terms. For examination purposes, again, examiners in law will find in the book a large store of most interesting questions, bearing especially upon the principles and doctrines of possession, pro-

perty, contract and tort. An experience of nearly twenty years as a law examiner has taught me that for testing the knowledge of candidates for degrees, scholarships, &c., there is nothing so satisfactory as setting concrete questions to be answered. For such questions the services of the 'coach' or the crammer are of little, if any, use. In the present work, moreover, as will readily be seen, the questions are of the most practical and interesting character that can well be conceived, and in this respect it is distinguished from various published collections of legal questions and answers (called by the French '*répétitions*'), which are nearly altogether theoretical, containing dry recapitulations of definitions, divisions, distinctions, &c., serving often as a mere mnemonic help to a lazy student. Jhering's questions require the student to reflect and apply accurately the knowledge he has acquired. The questions, though originally framed for students at German Universities and based mainly upon Roman law, are nearly all capable of being answered by English or Scotch law or in accordance with the general principles of jurisprudence. I can see no good reason, therefore, why the book should not prove as useful in English-speaking countries as it has evidently proved itself in Germany.

Finally, to the practising English lawyer and even to the ordinary layman the book may be of interest, as showing to what delicate legal problems the simplest facts of everyday life may give rise.

Twelve editions of the present work have already been published in Germany, and it has been translated into Italian, modern Greek, and other languages. The 8th German edition, published in 1892, was the last which received revision at the hands of the

author. Practically no change on this was made in the 9th and 10th editions. The 11th edition, however, was revised by Professor Lenel of Strassburg, and the 12th by Professor Detmold of Göttingen, and in both of these a good many alterations have been made in the author's text, and a number of new questions have been added, with special reference to the provisions of the recent German Code. I have thought it best on the whole to translate from the 8th (9th and 10th) edition, though at the same time adopting a certain number of the alterations and additions appearing in the 12th edition, where these do not relate purely to German law. I have also omitted one or two questions of the author's which had reference solely to German statutes or ordinances. All such alterations, so far as material, are indicated in the foot-notes. In numbering the questions, I have also followed the 8th edition. In translating sums of money, I have converted the German into equivalent English money.

Where questions are intended to be answered purely from the point of view of Roman law, this is either expressly stated or else the nature of the case will sufficiently indicate it.

I have also ventured to add one or two questions of my own at the end of several of the sections. These are distinguished by being placed within square brackets. They are nearly all questions which came under my notice while writing the translation, and I have resisted the temptation to which one might easily have yielded, of framing numerous questions based on English decisions. The idea was at one time before my mind of giving references to both Roman and English authorities bearing on the author's

questions, but this would have been to alter the character of the work, and, save in a few exceptional instances, I have not done it. Perhaps some one else may see fit to publish a volume of solutions hereafter.

For all the foot-notes, save two explanatory notes by the author, I am responsible.

I have to express my grateful acknowledgements to Professor Ehrenberger of Göttingen, as representing the heirs of Professor von Jhering, and also to Dr. Gustav Fischer, publisher in Jena, for courteously according permission to publish the present translation.

I am also indebted to my friend Mr. W. M. Geldart, Fellow of Trinity College, Oxford, for kindly reading over the proof-sheets, while the book was passing through the press, and making some valuable suggestions and corrections on points of translation, besides referring me to several of the English cases cited.

THE TRANSLATOR.

OXFORD,

*February 1904.*

# TABLE OF CONTENTS

	PAGE
I. RAILWAY TRAVELLING . . . . .	I
II. AT AN INN . . . . .	18
III. IN HIRED APARTMENTS . . . . .	33
IV. HOUSEHOLD AFFAIRS . . . . .	46
V. AT A TAILOR'S . . . . .	61
VI. AT A BOOKSELLER'S . . . . .	65
VII. AT AN AUCTION . . . . .	73
VIII. RELATING TO NEWSPAPERS . . . . .	76
IX. HOUSE BUILDING . . . . .	81
X. DEALINGS WITH NEIGHBOURS . . . . .	88
XI. IN THE STREET . . . . .	94
XII. IN NEED OF MONEY . . . . .	102
XIII. SOCIAL LIFE . . . . .	110
XIV. AT THE THEATRE . . . . .	121
XV. AMONG MUSICIANS . . . . .	128
XVI. AT A RAILWAY STATION RESTAURANT . . . . .	134
XVII. PUBLIC PLACARDS . . . . .	139
XVIII. AT SEA . . . . .	141
XIX. LEGAL RELATIONS WITH THE POST OFFICE . . . . .	146
XX. IN A FOREIGN COUNTRY . . . . .	154
XXI. ALL KINDS OF QUESTIONS . . . . .	156



# I

## RAILWAY TRAVELLING

1. To get to the station I step into a public omnibus passing my dwelling, without saying a word. Has this stepping-in any legal consequence—and what? 2. Would stepping into the carriage of a friend, who is taking me for a drive, have also legal consequences? What is the distinction between the two cases? 3. What position in a legal view does the conductor of the omnibus in the above case occupy? Does the Omnibus Company incur liability merely in respect of the contract I have made with the conductor? Or also for his delicts—for example, where he has appropriated a travelling-bag forgotten by me or deliberately given me too little change? 4. Also, where he has done the latter unwittingly? 5. Is the legal position of the driver the same as that of the conductor? Or is there a distinction in respect of the services they both perform for the Company? Does the position of the driver alter when there is no conductor? 6. Does any claim arise in respect of luggage which the passenger has given up, i.e. delivered over to the conductor (driver), and which the latter has packed on the top of the omnibus, and by what action would he make it good? 7. Also for those things which the passenger carries with him, and which are stolen from him in the omnibus? 7a. Owing to the omnibus being upset the passenger's effects are dashed against a shop window and damaged. Is the claim by the shop owner against the Company for

indemnification for breaking his window to be regarded from the same juristic standpoint as that for damaging the luggage? Does anything here turn on the question whether the passenger had given up his things to the conductor or kept them beside himself?

7 *b*<sup>1</sup>. In the interior of street cars, particularly on the windows, persons in trade frequently put up puffing advertisements of their wares, for which they have usually to pay considerable sums to the Tramway Company. What is the fundamental nature of the relationship here created? 7 *c*. Is the Company liable if an advertisement plate of this kind is injured by one of their employees or by a passenger? 7 *d*. If the Company allows a particular tradesman to put up his plate, is it thereby debarred from granting the same right to a competitor in his business? 7 *e*. A manufacturer of cocoa, Smith, has in respect of an arrangement of this nature put up a plate on which appeared in large glittering letters 'Smith's cocoa is the best.' Some time after he finds placed immediately underneath his plate another with the words, 'If Brown's cocoa is not to be had.' Must Smith submit to this?<sup>2</sup>

8. Believing that a passing tramcar is going to the South Station I get into one for the West Station. Is the mistake here an essential one and the contract consequently void? Must I pay the fare supposing that having immediately discovered the mistake I get out? Must I pay if I travel with the car to its destination?

<sup>1</sup> This and the next three numbers are from the 12th ed., in which they are Nos. 10 to 13 inclusive.

<sup>2</sup> Cf. *Mallin v. White* (1895), A. C. 154.

9. How, if the conductor gave an affirmative answer to my question—‘Is this car for the South Station?’ Must I even then pay the fare, or have I not a right on my side to claim damages from him or his employers, and by what action? 10. I can still manage by taking a cab to reach the South Station before the train starts, provided the driver goes very rapidly, and accordingly I promise him double fare if he arrives in time; must the Tramway Company make good to me this last-mentioned payment, or can it refuse on the plea that no one need pay double fare? 11. Can the cab-driver keep this extra payment to himself or must he hand it over to his employer? Does it stand on the same footing as a tip promised to him without any such proposal or bargain? 12. How would matters stand if the cabman had, by his declining to drive me for the simple fare, compelled me to give some extra payment? In Roman law would the *actio quod metus causa* lie in such case? Or the *actio de dolo*? 13. Is such payment in excess of the licensed fare legal, or can it be called in question by any action? If, however, in the case just mentioned I cannot catch my train and am forced to remain a day longer in the locality, can I demand reimbursement of the expenses thereby incurred from the Tramway Company? 14. If the conductor, in answering my question as above, intended to play a practical joke on me, may there be yet another kind of action against him, apart from that arising out of the contract? May actions arise out of jokes? Can this question be answered without regard to the personal relations of the parties to each other, does a joke played upon a stranger stand on the same footing with that upon

an acquaintance? 15. Is the conductor, to whom I am ready to pay the fare, bound to give me change for a five pound note because I have no small change? What happens when he either cannot or will not do so; may I go off without having paid? Is it enough that I assure him I will return when I have got change? Does the l. 10 § 16 *quae i. fr.* (D. 42. 8) come into operation here? 16. Is a banker again, to whom I have to make a payment, not obliged to give me change? Would his refusal to accept payment for the reason above stated involve him in any consequent liability?

17. I am making my way on foot to the station, and, in ignorance whether the train has already started, I ask some one I meet if it has, and upon his answering in the affirmative I turn back. Assuming that the train had not yet started, and that I should have been in time to catch it, can I sue my informant to make good any damage thereby sustained (for example, loss of my ticket already purchased for me by a porter sent on ahead with the luggage)? How, if my informant is free from fault, say he absent-mindedly answered *Yes* instead of *No*? How, if he deliberately told an untruth? Does anything turn on the point whether he knew that I should sustain damage<sup>1</sup>?

18. On arriving at the station I learn that the train is not going to start. Is it of consequence whether I had previously got a ticket, e.g. a return ticket<sup>2</sup> that I wished to use on this particular journey, or whether now for the first time I am about to take one? Is my legal position towards the Railway

<sup>1</sup> From 12th ed., No. 23.

<sup>2</sup> Circular ticket (*Rundreisebillet*) in 8th ed.

Company in both cases the same? 19. Would it in the former case be of consequence, whether the train was taken off for unavoidable causes, e.g. a heavy fall of snow, an inundation, or for causes attributable to the management, e.g. injury to the locomotive, or for no particular cause whatever? What point of view would prevail in the first of these cases? 20. Would in this case my return ticket, whose validity depended on my getting away with this train, remain valid? 20*a*. Would a power in a Railway Company to refuse to send off a train already announced, owing to there being too few passengers, be consistent with the object of public communication by railway? If this be answered negatively have private parties interested a claim against the Company? What is the proper way of guarding against the danger of such disturbance of public communication? Would the same means be appropriate in the case of a private coaching firm that has a regular service from one place to another? Would public advertisement of such coach service be sufficient to warrant an affirmative answer?

21. What legal transaction is involved in taking a ticket? Is it a contract of sale? In all other contracts of sale the seller has fulfilled his obligation by delivery; is it so here? What is the effect of it on the obligation of the Railway Company? What is the subject-matter of the Company's obligation, under what juristic conception of contract is it to be brought, and what bearing has the taking of the ticket upon it? 22<sup>1</sup>. Can one transfer one's ticket to another person, and how is this act to be regarded

<sup>1</sup> In the 12th ed. Nos. 56 and 57 *infra* are here inserted, forming Nos. 32 and 33 of that edition.

in law? Does it involve a cession or a delivery of property or both together? If the transfer of the ticket for valuable consideration implies a sale, could one conclude therefrom that the taking of the ticket at the office also implies a sale? 23. Is it consistent with the proper conception of railway tickets that Railway Companies should prohibit the alienation to third parties of circular or return tickets? Does a person who has acquired such a ticket from another require to explain and answer questions as to how he acquired it? Must he, if need be, prove that he personally took the ticket or must the railway officials bring proof to the contrary<sup>1</sup>? What would be the consequence of his having to prove that he personally took the ticket? Assuming that by having to do so he missed his train, would he have a claim for damages? 23 *a*. Would the same rule apply to combined circular tickets<sup>2</sup>, which are issued only to persons specifically named, and, if not, how would the sale of such be determined by Roman law? Has the person so selling undertaken an obligation not to transfer his ticket to others, and does his acting to the contrary give rise to a claim based on contract or one based on tort? How would the act of the purchaser, who makes use of it, be dealt with by Roman law? With reference to this, what rule applies to a person who makes delivery to another than the purchaser of a thing already sold by him but remaining in his custody?

24. Must the Railway Company carry me on, if I can prove that I took a ticket but have lost it, or

<sup>1</sup> From the 12th ed., No. 35.

<sup>2</sup> *Kombinierte Rundreisebillets*, i. e. those that are available over the lines of different companies.

that it has been stolen from me? Or that when being examined it fell out of the window owing to the ticket-collector's fault?

25. I hand over my effects to a porter to carry to a compartment for me; is this a *depositum*, a *mandatum*, a *locatio conductio*? Is the sum I give him for his services a present? 26. At many stations arrangements are made for taking temporary charge of passengers' effects; is the Railway Company liable, because it has put at the disposal of particular persons special rooms for the purpose of such custody? 27. Is the porter or the Railway Company responsible, if the former has neglected to call out the departure of trains ('abzurufen') in the waiting-rooms in accordance with his instructions<sup>1</sup>? 28. The inaccuracy of a railway time-table may likewise cause a passenger to miss his train. Are the publishers or the retail booksellers from whom one got the book responsible? If they can evade responsibility in such cases, could they equally do so if the publishers had issued copies of the previous year's time-table still in stock under a title indicating that they were for the present year? Wherein lies the distinction between this and the previous case?

29. I enter a compartment and put my things on a seat, but a moment after get out again to look after something; has my intention to appropriate this seat been thereby made sufficiently clear? 30. In the meantime another person takes the seat; can I claim it as mine? Is my claim one to be decided according to the principles of the doctrine of posses-

<sup>1</sup> The rest of this No. is omitted as relating purely to a question of German railway administration.

sion? If the object of possession is to protect either personality itself (Puchta) or the individual will (Bruns), is there not in this case possession? Is there not to be seen in the pushing aside of my things a disregard for the intention I showed in taking the seat, and therewith also a disregard for my personality? 31. If a claim in these circumstances is generally well founded, how may it be asserted? Has the Railway Company not given me assurance of a definite seat or, if not, at least of such a one as the guard has pointed out to me, or as I have taken possession of with his tacit assent? 32. May I forcibly remove the passenger who has taken my seat? Should the penal sanction imposed by Roman law upon self-help deter me from doing so? 33. Is the principle of the Roman law, that one may repel force by force, restricted to juristic possession? Does the requirement of l. 3 § 9 and l. 17 *de vi* (D. 43. 16) *confestim, non ex intervallo—in ipso congressu* apply to the case figured?

34. Owing to the second class compartments being crowded I am put into one of the first class; am I on general legal principles bound to leave it again at the next station<sup>1</sup>? 35. Is it a reasonable construction of the contract with the Railway Company that its officials may put into a compartment with other passengers persons obviously suffering from ailments of a highly disagreeable character, or from infectious diseases, or mad—assuming the condition of such persons to be known to the officials? 36. Can a person so afflicted demand a separate compartment for himself? 36 *a*<sup>2</sup>. If one of the other passengers should catch the in-

<sup>1</sup> That is, if a second class seat is then vacant.

<sup>2</sup> From 12th ed., No. 50.



fectious disease, has he a claim for damages against the Railway Company? Or against the sick passenger?

37. Does disregard of the notice not to smoke in particular compartments entail legal consequences? May the other passengers themselves prevent such smoking, or must they complain to the guard? Are they entitled to forcibly take away the cigar from a person disregarding their remonstrance<sup>1</sup>? Can the smoker reply to them that it is solely a matter of his disregarding a railway regulation, which they have no right to enforce? In whose interest is such a regulation made? If in the interest of the passengers does that fact give them a right of action? Against whom would it lie?

38. A drunken man, who has taken a ticket from station *A* to station *B*, goes to sleep and cannot be roused when the train arrives at *B*, and is carried on to *C*; must he pay the additional fare to *C*? He pleads that in his state of sleep and intoxication he could make no contract and so is not liable, and that it was the duty of the Railway Company to have had him put out at *B* by the guard; on these grounds he holds that he is even entitled to be carried back to *B* without payment. 38*a*<sup>2</sup>. Ought the decision to be the same as in the preceding case where a passenger in one of the railway sleeping-cars has not been awakened by the conductor, who was instructed to waken him at the proper time, and so is carried on?

39. I give the guard a tip to induce him not to put any one into the same compartment with me and my party, is this a *turpiter datum* and *acceptum* in the sense of the Roman civil law, assuming that there is

<sup>1</sup> From 12th ed., No. 51.

<sup>2</sup> From 12th ed., No. 53.

nothing in the guard's instructions plainly forbidding him to take tips? 40. Is it conformable to the interests of railway administration to permit such taking of tips<sup>1</sup>? 41. If he nevertheless does put others into my compartment is he bound to give me back what I gave him? What action in Roman law suggests itself here? How, if he were under the necessity of doing so, owing to all the other compartments in the train being full? Does not the impossibility of performance here relieve him from the obligation of paying back? 42. Does it follow that, because a person is not liable in respect of non-performance of a duty undertaken by him, he can keep what was given to him as an equivalent for it? 43. If a person has taken a whole compartment of eight seats for himself and his family consisting of three persons, and owing to the train being overcrowded a passenger is put in beside him, what claim has he? Can he, in respect of non-fulfilment of the contract, demand back the whole sum paid by him or the half, seeing that he himself actually used only four seats? Or can he demand only the amount for the single place for which the Railway Company has received double payment? Will the Company be able to set up the plea of insufficient interest on his part, that the law only takes into account such *interesse* as can be estimated in money—'*ea enim in obligatione consistere, quae pecunia lui praestarique possunt*,' l. 9 § 2 *de statulib.* (D. 40. 7)—all other grounds of damages being disregarded, that it has fulfilled its obligation to carry him to his destination, that whether he was alone with his family or in

<sup>1</sup> The rest of this question is omitted as relating purely to a matter of German railway law.

company with others was indifferent, the judge could not assess in money the loss he suffered from the comfort of his journey being marred.

44. If a person bribe the guard to let him travel without a ticket, does this stand on the same footing as the case above mentioned (§ 39)? 45. If the fraud be discovered, and he has to pay the fare, can he demand back from the guard the bribe given? 46. How would his act, as regards the Railway Company, be characterized in Roman law? As *dolus*? 47. Is the above expression 'bribe' (*bestechen*) appropriate here in the sense of criminal law, does it not make a difference on this point whether it was a State or a private railway? 48. How is the following occurrence to be legally regarded? At a station, where a train stopped in the evening, a young man slipped into a compartment and hid under the seat, and so travelled unchallenged to the next station, where he got out without any one noticing him. Is an obligation on his part to pay the fare to be deduced from this? Perhaps, according to Roman law, by means of the *act. de dolo* or *iniuriarum*? From what legal standpoint must we regard the unauthorized use of another's property? 49. Children under four years<sup>1</sup> can travel free, if accompanied by an adult who has taken a ticket. How are we to regard the action of a mother who states her child to be younger than it is? Can she not found on l. 11 § 3 *quod falso* (D. 27. 6), by which a father is excused for making an untrue statement regarding the age of his daughter: '*patri ignoscendum . . . affectu enim propensiore magis quam dolo id videri fecisse*'?

<sup>1</sup> In England under three years.

50. Does liability attach to a Railway Company by Roman law for bodily injury to passengers through an accident imputable to their fault, and to what extent? 51. Is it still necessary at the present day to recur to the principles of Roman law in this matter<sup>1</sup>? 52. Is the Company responsible by Roman law for passengers' luggage? Does it make a difference whether it was placed in the custody of the Company, or whether the passengers carried it with them<sup>2</sup>? 53. Is late arrival of trains owing to fault of the Company a ground for damages? 54. Delay in giving up luggage in charge of the Company? 55. Delivery of it to one who presented a voucher for it lost by us? Is such a voucher to be characterized in a legal sense as a document to bearer?

56. Is the railway administration, apart from special statutory provisions or privileges conceded to it by the State, bound to provide for all passengers who want to be conveyed, and where they cannot be all carried in one train, to put on an extra train? Does it in this respect make any difference whether tickets have been already taken by the passengers or not? Is the legal position of the Railway Company towards both classes of passengers the same? (See above, No. 18.) 57. On what fact would passengers in the second category require to base the obligation for which they contend? On the implied undertaking by the Company under its Concession? On the nature and object of railway traffic? On customary law? On publication of its time-tables? Is there

<sup>1</sup> For German law on this important question see the *Reichsgesetz* of June 7, 1871, cited by Jhering.

<sup>2</sup> For English law on this point see *Talley v. G. W. Ry. Co.*, L. R. 6 C. P. 44; *Bunch v. G. W. Ry. Co.*, 13 App. Ca. 31. Cf. the German *Handelsgesetzbuch*, §§ 429, 465, cited in 12th ed., No. 69 of presentwork.

a promise involved in the last-mentioned of these<sup>1</sup>? 58. Owing to the second and third class compartments being full, some third class passengers are put by the guards into one of the first class, must the passengers in this admit them? Was it the intention of the latter merely to obtain more comfortable seats, or what else, and has the Railway Company merely guaranteed them first class seats, retaining a completely free hand in other respects as regards vacant seats in that class, so that, for example, persons of the lowest social position may be transferred from the third to the first class? 59. Where an individual in that rank of life, for whatever reason it may be, asks for a first class ticket, may the Company refuse to give him one<sup>2</sup>?

60. Railway bye-laws provide that passengers must pay one shilling to the guard for cleaning places in the carriage if dirtied by them<sup>3</sup>. A declines to pay this amount, because the soiling of the compartment by him, which he admits, was not due to his fault, the motion of the train and the heat in the compartment having made him ill, which we will take to be true. He asserts that the passenger's *culpa* is a condition precedent of the particular bye-law, that, even apart from express provision, this results from general principles requiring *culpa* in *damnum iniuria datum*, and that accordingly this bye-law must be interpreted in a restricted sense<sup>4</sup>.

<sup>1</sup> See *infra*, No. 67 n.

<sup>2</sup> Cf. *supra*, No. 35, and *infra* II, No. 82.

<sup>3</sup> This is by German railway law (V. O. § 23). Such a provision seems to be unknown in Great Britain. It would not be a bad thing to introduce it.

<sup>4</sup> Cf. on this point the German Code, § 823, referred to in 12th ed., No. 73.

61. Arrived at my destination, I get into the omnibus of a particular hotel, but on reaching the hotel I learn that it is full; must I pay the fare? 62. There being no vehicle at the station, I employ a porter to conduct me to an hotel and make my way to it on foot; would the charge which the porter can make for this be likewise claimable by a fellow passenger were he to perform the same service for me?

63. The child of a workman, five years old, in charge of its sister aged thirteen, having come to a railway-crossing of the Berlin-Potsdam railway on the road leading to Saarmund, slipped unnoticed beneath the barrier and ran upon the permanent way, where it was struck by a passing train and severely injured. The father raised an action against the Railway Company for damages (medical expenses, charges for maintenance, and settling a provision). The defendants pleaded—first, gross negligence of the child in that it had, despite the warning shouts of the watchman of the line and bystanders, crept through the regularly closed barrier; second, gross negligence of the child's parents in having sent it to so dangerous a place as a level-crossing under the insufficient care of a thirteen-year-old sister. The plaintiff replied that the closing of the line by a mere barrier was insufficient, that at so frequented a level-crossing lattice-railings should have been put up—which in fact had been done by the defendants since the accident. What decision should be given according to Roman law? 64. Is a Railway Company responsible for a fire caused by sparks falling from the engine of a train<sup>1</sup>?

<sup>1</sup> For English law see *Smith v. London & S. W. Railway* (1870), L. R. 5 C. P. 98, and 6 C. P. 14.

64 *a.* When approaching a place where customs are collected a traveller conceals certain articles subject to duty which he has with him, what consequences would this entail upon him by Roman law, if discovered? 64 *b.* A fellow traveller, to whom he mentions that he intends to declare them, advises him not to do so, and says that he will guarantee that the handbag, in which he has them, will not be examined. Is the latter liable on this guarantee, and, if so, what action of the Roman law suggests itself? Would it make a difference if the guarantee had been undertaken in respect of a money payment?

BY THE TRANSLATOR.

[65. *X* employed a cabman to drive him from the station to his hotel, and, on arrival, gave him half-a-crown, which was sixpence more than the legal fare. The cabman, supposing him to be a stranger, claimed one shilling additional. *X* thereupon asked back the half-crown, intending to give only the legal fare, but the cabman refused to restore it. Could the latter assert any right to the extra sixpence? Did the circumstances justify revocation of a donation according to Roman law—on the ground of ingratitude? or attempted fraud? See l. 10 Cod. *de rev. don.* (8. 55). Or was there perhaps no *traditio* of the half-crown sufficient to pass the property in it, in respect of the *causa dandi* and *causa accipiendi* not being congruous or the *animus* of the cabman to receive it in property not being complete? The two following texts bear on this point:—l. 18 *pr. De R. C.* (D. 12. 1) '*Et puto . . . nummos accipientis non fieri, cum alia opinione acceperit,*' and l. 36; *De A. R. D.* (D. 41. 1)<sup>1</sup>.

<sup>1</sup> 'Et si pecuniam numeratam tibi tradam donandi gratia, tu eam quasi creditam accipias, constat proprietatem ad te transire.'

66. Upon tickets being examined in course of a railway journey, a traveller is found to have no ticket and no money with him to pay for one. He explains that he has forgotten his purse, and offers to give his name and address. Are the railway officials entitled to eject him from the train? or must they carry him to his destination? (Cf. No. 24 supra.)

67. Relying on the current time-table of a Railway Company I arrive at the station with the intention of travelling by one of the trains announced in it. I am informed that the train in question was taken off the previous month, but this by oversight was omitted to be noticed in the time-table. Is the Company liable to me in damages<sup>1</sup>? In respect of contract? or of tort? (Cf. Nos. 19 and 28 supra.)]

68. In a first class compartment of a railway corridor-carriage, containing six seats, *A*, a passenger, placed a large hamper he had with him on the seat next the one he occupied. All the other seats of the compartment were occupied by passengers, and there was no other seat of the same class vacant in the carriage. *B*, who had looked in vain for a vacant place, stood outside in the corridor for a time, but afterwards complained to the guard. At the first station where tickets were examined the guard demanded from *A* a supplementary fare in respect of the seat occupied by the hamper. The latter at first refused to pay, on the ground that no inquiry had

<sup>1</sup> For English law see Leake on Contracts, p. 11, and cases there cited, especially *Denton v. G. N. Ry. Co.* (1856), 5 E. & B. 860, where the Company was held liable in an action on tort (deceit and misrepresentation), and opinions given by a majority of the Court that there was also a cause of action in contract. The question whether this decision is not overruled by *Derry v. Peek* (1889), 14 App. Ca. 337, is noticed in Pollock on Torts, p. 284 n.



been made of him whether the seat was engaged, and that, if there had been, he would at once have removed the hamper and placed it on the floor. Ultimately, however, on threat of removal from the train, he paid. Was the claim for the extra fare legally enforceable

## II

### AT AN INN

1. Is an innkeeper bound to receive travellers<sup>1</sup>?  
 2. Would it be well to impose such an obligation by statute<sup>2</sup>? 3. Is it a personal insult to a respectable guest to turn him away without cause? 4. A local resident, who had frequently behaved improperly in the public room of an inn, was forbidden by the landlord to enter it, but continued none the less to do so; can the landlord by his servants eject him? The landlord prefers, however, to take legal proceedings against him; in that case the lawyer to whom he applies may consider that the *interd. uti possidetis* can be raised. Only a doubt arises from the fact that the landlord is merely tenant of the inn, and so is not jural possessor<sup>3</sup>. Would the Romans have allowed the interdict in this case or possibly some other action? 5. Is a guest who has ordered a room beforehand bound to pay for it as a matter of course? Is this so, if through illness or breakdown of railway communication he is prevented from occupying it? 6. Or even when he has duly countermanded it by

<sup>1</sup> As to Roman law see l. *un.* § 6 *furti advers.* (D. 47. 5). This text bears 'namque viatorem sibi eligere caupo vel stabularius non videtur, nec repellere potest iter agentes.' Cf. l. 1 § 1 *Nautae, caupones* (D. 4. 9) 'Est in ipsorum arbitrio, ne quem recipiant.' This antinomy has never been satisfactorily explained.

<sup>2</sup> In England the obligation exists by common law. See Calye's case (1584), 1 Sm. L. C. 115; Leake on Contracts, 132; *Broune v. Brandt* [1902], 1 K. B. 696.

<sup>3</sup> i. e. in the view of Roman law. In English law he is, of course, a legal possessor.

telegraph? 7. Is the order for a room by telegram binding without a reply? If this be answered affirmatively, how does it harmonize with the theory of contract? 8. Is it an important circumstance that the innkeeper, where the visitor has not arrived or has countermanded the rooms, has let them to another, or could have let them? 9. Has he to prove the negative or the guest the positive on this point? 10. In view of a festivity at *X*, which promised to attract many strangers, *A* took an early opportunity of securing for himself a bedroom for ten shillings in one of the hotels of the place. The landlord subsequently avails himself of the chance of letting the room for £2 10s., and *A*, arriving late in the evening, finds the hotel full and has to spend several hours of the night searching round the town for quarters, till finally he has to put up at a lodging-house for labourers with miserable accommodation. Would it be advisable for *A* to raise an action against the hotelkeeper? In the lodging-house he had only to pay four shillings, and the innkeeper maintains that he suffered no damage, but rather gained by his exclusion from the hotel? 11. *A* transfers the chamber, which he had secured, to a visitor, who offers him £2 10s. for it; the landlord contests his power to do this. Or *A* brings a friend with him, and one of them sleeps on the bed while the other sleeps on the sofa; must the landlord submit to this? He asserts that thereby he loses a customer who would otherwise have hired a room. *A* replies—that just as he could allow a friend to share in a bottle of wine or a dish that he has ordered, so he can let him share his room; were it otherwise he could not even receive his friend in it in a general way, without the landlord's permission. 12. A traveller is driven

by a cabdriver, to whom he gave the name the 'King of Prussia,' a first-class hotel, to the 'Crown Prince of Prussia,' a third-rate hotel, and has a room booked to him there; afterwards on discovering the mistake, and before he has used the room, he leaves the hotel and refuses to pay for the room, referring the hotelkeeper with his claim to the cabdriver, who made the mistake; would it be material if he had slept a night in the room?

13. When is *receptum*<sup>1</sup> in an inn regarded as established, and what consequences has it? 13 *a*<sup>2</sup>. Is the action *ex recepto* available to one who is living permanently in an inn and paying rent? 14. By a fire which broke out in the night in an inn visitors' things are destroyed. Is the innkeeper liable? He asserts that there was *vis maior* for which he is not responsible, and refers to l. 12 *de peric.* (D. 18. 6)<sup>3</sup>, which releases the owner of a house from liability for fire caused without his own fault. 15. By means of the same legal reasoning he thinks he can escape liability for damage which the 'boots,' who has suddenly gone out of his mind, has done to the garments of a guest given him to clean. 16. Is an innkeeper liable to a guest, who has left his key in the door of his room, for things stolen from the room? Assuming<sup>4</sup> the answer to be in the affirmative, is he also liable for things pur-

<sup>1</sup> A praetorian obligation corresponding to the obligation imposed by the common law of England upon innkeepers for loss of or injury to their guests' effects.

<sup>2</sup> 12th ed., No. 14.

<sup>3</sup> 'Si vendita insula combusta esset, quum incendium sine culpa fieri non possit, quid iuris sit? Respondit, . . . si venditor eam diligentiam adhibuisset in insula custodienda, quam debent homines frugi et diligentes praestare, si quid accidisset, nihil ad eum pertinebit.'

<sup>4</sup> 12th ed., No. 17.

loined from trunks that have been left unlocked? 17. Does such liability extend to things which a visitor has laid down in the hotel restaurant, where he is taking refreshments, or which a waiter there has taken from him and hung up on the rack for coats and hats? Would not the waiter at least be liable? Speaking generally, is a landlord, who keeps only a restaurant, liable *ex recepto*<sup>1</sup>? 18. Have notices in the rooms, by which the innkeeper repudiates all liability *ex recepto*, any legal effect? 19. Must a guest pay attention to a notice in the rooms requiring all articles of value to be given into personal custody of the landlord? 20. And if this is the case, can the landlord thereupon refuse to reimburse a guest for the loss of his watch and purse, stolen from his bedroom table during the night, on the ground that he ought to have delivered them to him? 21. Was it *culpa* on the part of the guest not to have locked his door at night? or 22. to have left the window (on the ground floor, or first, second, &c. storey) open by day or by night? 23. On the departure of a traveller some article of his is left behind by oversight, does the obligation based on *receptum* continue as to this? 24. Does it also exist when the visitor, after giving up his room and paying his bill, asks the landlord to keep a parcel for him either till his return or till some one calls for it, or else asks him to send it after him by post? Can the landlord assert a right of lien on such articles in respect of possible charges forgotten to be entered in the bill? Can he, speaking generally, still treat the bill as liquid, after he has receipted it? 25. Is the *receptum* rule also applicable to letters and parcels received for the visitor before his arrival?

<sup>1</sup> 12th ed., No. 18.

26. Is the landlord liable if he delivers them up to a third party who presents the visiting-card of the addressee? 26 a<sup>1</sup>. Does liability *ex recepto* also extend to a letter containing valuables which the traveller has handed to the hall porter to send off by post?

26 b<sup>2</sup>. Is the landlord liable if the postman delivers a letter containing money to a person not entitled to it, because the landlord had stated this person to be the addressee?

27. Is it one single contract which a guest enters into who stays one night in an hotel, taking supper in the evening and breakfast in the morning? Or if not, how are we in a legal view to regard, first, the lodging, and then the ordering of food and drink?

28. Does the same hold good with regard to *pension* where board and lodging are given for one fixed price? How is this to be legally characterized—as a combination of sale and hire? 29. A, who has contracted for *pension* for a week, finds himself compelled to go off on a journey for two days; can he on this account make a deduction, or, if not, can he not transfer the *pension* to another for the two days? He thinks, that just as he can transfer to another a bottle of wine or a dish ordered by him, he can do this with the *pension*, that it is a relationship of the nature of usufruct, the enjoyment of which may, as is well known, be transferred to another, l. 12 § 2 *de usufr.* (D. vii. 1) '*sed et si alii precario concedat vel donet, puto eum uti,*' l. 67 *ibid.* . . . '*etiam invito herede.*' 30. Is there by Roman law a hiring (*conductio*) of a room in an inn, if the price is not made known beforehand (by posted up notice or otherwise)? 30 a. Is the notification of the tariff of the room by

<sup>1</sup> 12th ed., No. 27.

<sup>2</sup> 12th ed., No. 28.

posting it up to be viewed as a general offer? 30 *b*. Is it binding on the landlord? Even if through special causes, e.g. a public exhibition, the prices of rooms have notoriously been raised by all the innkeepers? Can the landlord not reply to a guest, who founds upon the tariff, that this has been calculated only for normal conditions, and that the guest ought to have said to himself that it cannot apply to such exceptional circumstances? 31. Must the innkeeper permit a visitor, who has once been taken in, to stay as long as the latter wishes<sup>1</sup>? 32. If he have put up a visitor on his arrival, can he immediately afterwards deprive him of his room, and turn him out of the inn? 33. The visitor has inquired beforehand how much the room costs 'per day,' and, after having used it, wishes to leave it at the end of six hours and to pay for only a quarter of the day, must the landlord rest satisfied with this, or can he appeal to the maxim, *dies coeptus pro completo habetur*. 34. How is the day at an inn to be reckoned? Does the *civilis* or *naturalis computatio* apply to it? For example, is a guest who arrives at three o'clock in the morning entitled to remain till three o'clock of the following morning, or may the landlord charge him for two days (or, as the case may be, nights)? 35. Can the landlord, with whom a visitor has contracted 'per day,' charge him specifically in addition for the night or his bed? 36. Can he make a charge for cleaning up the room, or, if the visitor refuses to pay this, can he leave the room, the bed, &c. uncleared and unmade; in other words, is the letting of the room to be regarded as *locatio rei* or *locatio operis*? 37. Can he retain the effects of the visitor, if the latter on leaving refuses to pay the bill?

<sup>1</sup> Cf. *Lamond v. Richard* [1897], 1 Q. B. 541.

38. Can the guest take away with him the candles for which he has been charged in the bill? Would it in this matter make a difference, whether the charge is 'for light' or for 'two candles'? 39. Can the guest who has ordered fruit or sweetmeats (*Confect*) *à la carte* put them in his pocket instead of eating them? Can he do so if the fruit and sweetmeats are served at the dinner-table? 40. The guest has taken a book out of the reading-room of the hotel to read in the garden and leaves it lying there, so that it is spoilt by rain. By what action can the landlord claim compensation—by the *act. commodati* or the *act. legis Aquiliae*? Against the latter seems to stand the rule that in non-contractual relations one is not liable for *culpa in non faciendo* (here, namely, the neglect to bring the book back to the reading-room).

40 a<sup>1</sup>. At many places the daily bill of fare is drawn up in such a manner that opposite the printed names of dishes the prices of the particular dishes that are to be served for the day are entered by hectograph printing. One day the hectograph had got one line out of place, so that the price fixed for 'sardines' stood opposite 'salmon,' that for 'cutlets' opposite 'beefsteak,' and so on. A guest who had ordered salmon or beefsteak refused to pay more than the price indicated. Was he justified?

41. The guest tells the waiter to bring him a bottle of wine marked on the wine-list. Is this a mandate or some other legal transaction? 42. At what moment does the risk pass to the person giving the order—at the moment when the waiter has taken the bottle out of its bin in the cellar, or when he has placed it before the guest? 43. The waiter by in-

<sup>1</sup> From 12th ed., No. 43.



advertence brings him a better and dearer wine than he ordered, and he drinks it without noticing the mistake; must he pay the price of it? 44. How, if he notices the mistake beforehand? He wants to keep the bottle at the price corresponding to his order, because the waiter has delivered it to him. Assuming that, if he drinks it, he must pay the price according to the tariff, on what would his liability for such price rest: on consent, *dolus*, or enrichment? 45. If by mistake, instead of the good wine he ordered, an inferior sort is brought to him, must he pay the price of the former? 46. The guest by a piece of awkwardness knocks out of the waiter's hand a bottle of wine that he was bringing for another guest; must he pay for the broken bottle the price of six shillings marked on the wine-list, or only three shillings, the actual value of the wine?

47. Is the wine-list to be taken as *dicta promissa*? In a large part of Germany there is to be found on nearly all wine-lists the so-called *Liebfrauenmilch*, and at a price considerably less than it is sold for at its native place at Worms; the connoisseur knows that everywhere this wine is only a label-wine (*Etikettenwein*). Can the guest who has ordered a bottle of this wine reject it at once after tasting it, on the ground of non-fulfilment of the *dicta promissa*? Would it influence the decision that the guest had asked beforehand whether genuine *Liebfrauenmilch* was to be had? 48. Is the guest also obliged to keep the wine if it has turned sour, or has been adulterated? 49. The guest leaves wine standing which is not to his taste; does it again become the property of the landlord, or was it all along his property? Assuming it became the property of the

guest, is there a gift of what was left to the landlord? 50. At a public banquet a person pours into his own glass some champagne out of his neighbour's bottle. Is it material whether this happened from absent-mindedness or deliberately, and is the occurrence to be judged alike in all cases, or is the relationship of the parties to be considered, as whether he who did the act was a familiar acquaintance or a complete stranger? Is it of importance whether it was poured out behind the back or before the eyes of the neighbour? Assuming that the latter demands compensation, on what would he require to base his claim? Would it be necessary, by Roman law, to found on l. 30 § 2 *ad leg. Aquil.* (D. 9. 2)<sup>1</sup>, or can he state another ground of action?

51. Several guests agree together to order a choice wine, and one of them calls out to the waiter, 'Bring us a bottle of such and such a wine and four glasses'; is he alone liable to pay for the wine or is he, seeing he said 'us,' bound only for his share? 52. Would it as regards liability make a difference if he had added, 'We are going to throw for the wine, bring us the dice box'? 53. Is the agreement to throw for the wine legally binding on the parties interested? If not, can the one who has lost and has paid for the wine, have recourse against the others? Does it fall under the prohibition of games of chance in Roman law? The l. 4 *pr. de aleat.* (D. 11. 5) permits '*quod in convivio vescendi causa ponitur, in eam rem familiam ludere*'; may not what is here stated for food be also, from the point of view of modern law,

<sup>1</sup> 'Si quis alienum vinum vel frumentum consumpserit, non videtur damnum iniuria dare ideoque utilis danda est actio.' See Vangerow, *Lehrbuch d. Pandek.*, iii. p. 583.

applied to drink, and the term *familia* be extended to any company at table? 53 a<sup>1</sup>. A spendthrift without a curator orders a dinner at a restaurant. Has the landlord under no circumstances a claim against him?

54. The following odd case of ordering wine was recently reported in Berlin newspapers. Two strangers ordered a bottle of Madeira in a garden-restaurant at Moabit<sup>2</sup>, which, on tasting, they found not to be Madeira but Nordhausen brandy mixed with ginger. This mixture, according to the averment of the landlord, was universally known in Moabit and the neighbourhood by the name of Madeira, and well liked. Should the persons who gave the order, and who plead that they are not liable to pay the price, found upon essential error or upon failure of *dicta promissa*? The landlord maintains that the *dicta promissa* are actually fulfilled within the meaning of the ordinary language of the locality, and in accordance with the rules *locus regit actum* and l. 34 de R. J. (D. 50. 17) '*erit consequens ut id sequamur, quod in regione, in qua actum est, frequentatur*'; the latter proposition, however, is the foundation of his case. Would it lead to a different decision if the order had been given by regular frequenters of the restaurant? Assuming this, what bearing has it on the doctrine of interpretation of contracts?

55. The guest has to pay a bill of eight shillings and gives the waiter a sovereign, out of which he has to receive change. How is this act of giving to be regarded legally? Does the waiter at once acquire the property of the sovereign, or only when he has

<sup>1</sup> From 12th ed., No. 57.

<sup>2</sup> A suburb of Berlin.

given twelve shillings change; is it accordingly an unconditional or a conditional payment? 56. By what action could the waiter be sued for the balance; perhaps by the *condictio indebiti*<sup>1</sup>, since twelve shillings too much have been paid? 57. Admitting that the obligation to give back the change is to be regarded as a *modus* attached to the payment, by what action can the guest enforce performance of the same? 57 a. The guest's habit is to give no tips to the waiter, and the latter uses this opportunity to abstract one shilling for tips; how would his method of proceeding have to be judged? Is not the conception of delict here applicable (theft, fraud, or some other)? 58. The guest has by inadvertence given a sovereign for half-a-sovereign; has the property here passed? 59. Does the same rule apply where the guest has made a mistake in the amount of the bill, say, he has taken a badly-formed 3 for a 5, and has thereupon given 5 instead of 3? 60. How is the act of the waiter to be characterized who, knowing the mistake, accepts this amount? 61. Are we to assume knowledge on his part when a guest, who has to pay a bill of nine and sixpence and by mistake has given a sovereign for half-a-sovereign<sup>2</sup>, says to him, when about to give change, 'Never mind, you can keep the rest for yourself'? 62. In these several cases is the landlord also liable? 63. How is the waiter's relationship to the landlord to be regarded, so far as it has a legal bearing upon questions with third parties? 64. Can the landlord repudiate responsibility for the above-

<sup>1</sup> Corresponds to the action for money had and received in English law.

<sup>2</sup> The sums of money in this question are slightly altered from the original.

mentioned dishonest acts of waiters, on the ground that he gave them no authority to commit them, or on the ground that he had taken all care in selecting them? 65. Has he to answer for it if the waiter steals from the guest, or insults him, or borrows money or a book from him? 65 a<sup>1</sup>. The guest puts down on the table the money due by him and goes off. Who is possessor and owner of the money? Is it of importance whether he called the waiter's attention to it before going away or not?

66. How should tips to servants in an hotel be regarded? As charity, or donation, or fulfilment of an *obligatio naturalis* or *civilis*? 67. Is the landlord bound to hand over to the servants, as having been charged and received on their behalf (*negotiorum gestio*), the sums which appear in the bill for service? 68. Is a contract between him and his servants valid which binds them to hand over all tips to him? Would it apply to a tip given under the express condition that the recipient should keep it for himself? 69. If a guest, in ignorance of the fact that gratuities to servants have been already included in the bill, has given a tip over and above, can he demand it back on the ground of this mistake? Is it a mere error in motive, and how does such an error affect a donation? Or is it an error with respect to a supposed debt? 70. If, as is customary in many hotels, the gratuities are put into a common box and periodically divided among the servants, how do the participants stand towards each other in a legal view? 71. From what point of view is a case of failure to put into the box to be regarded? 72. The boots of an hotel made a contract with some

<sup>1</sup> From 12th ed., No. 70.

one, that for £200 he would hand over all his tips to him; what is the nature of the contract? An *emptio spei*? 73. Assuming this to be the right view, how would matters stand if the boots, owing to illness, has to give up his place after the first quarter of a year, or is dismissed for dishonesty? 74. What legal relation arises where a boots serves an innkeeper without wages, looking solely to the tips, or where he actually pays something to get the place? 75. In hotels it is customary for travellers to put out their shoes at their bedroom doors at night, and leave out their clothes; that the boots may brush them; has this act any legal significance? 76. Is the landlord responsible if they are stolen? 77. A person out riding got down at a country inn in order to take some refreshment, and gave his horse to the boots to hold. Is the landlord liable if the horse is injured owing to the negligence of the boots? In respect of mandate—deposit—hire—*receptum*? Would it make a difference as regards the landlord's liability, if the rider had engaged quarters for the night?

78. May an innkeeper set up the same signboard as another has set up? He maintains that names are free, that no one has an exclusive right to the 'Black Bear,' 'Red Lion,' &c. 79. In a town in Schleswig the occupant of an hotel, much frequented and well known over the whole countryside, who had been so far honoured by the governor of the province, the Landgraf of Hesse, putting up at it, that he asked and received permission from the said governor to change the name of the hotel, 'The Grey Ass,' to that of 'The Landgraf of Hesse.' Another hotelkeeper adopted the name now set free, and in consequence thereof gained unusual custom. Could the origi-

nal proprietor of the sign object to his using it? Could strangers who, in ignorance of the circumstances, had engaged rooms from the second hotel-keeper, draw back from their engagement? In the case before us the first-mentioned landlord, having learned wisdom through the damage he sustained, and in order to guard against further mistakes by customers, added to his sign, 'The Landgraf of Hesse,' the words 'This is the genuine Grey Ass'; was this an act which could be objected to?

80. In an hotel in Berlin the following case recently occurred. A guest made an unsuccessful attempt to commit suicide, and the landlord, finding him lying unconscious, sent for a doctor. The guest afterwards refused to pay the doctor his fee, on the ground that he had come against his wish, and told him to apply to the landlord, who had called him in. The latter repudiated liability on the ground that he had merely caused the doctor to be summoned, i.e. done no more than notify him of what had happened, in accordance with the dictates of humanity. Assuming the landlord to be condemned to pay the fee, can he not have recourse against the guest? Perhaps by the *act. neg. gest.*? Could the guest not answer that the *negotiorum gestio* was against his will? Or has he perhaps assented to it, in that he acquiesced in the doctor's treatment after he became conscious?

#### BY THE TRANSLATOR.

[81. A, a guest staying at an hotel, ordered a bottle of wine for dinner and drank two or three glasses from it, the bottle being left about half-empty on the table. The following day at lunch he asked for the bottle, and was informed that it had been treated by

the waiter as a perquisite and the wine consumed. He refused to pay for more than half a bottle. Was he justified? (Cf. No. 49.)

82. A lady bicyclist, wearing a Bloomer costume (knickerbockers), got down at an inn in the country for refreshments. The landlord refused to admit her to the public room of the inn, but offered to supply her with refreshments in a private room. In an action by her he pleaded that her dress was objectionable on the score of propriety, and that he was not bound to serve any one who did not conform to the ordinary habits of society. Was he within his rights<sup>1</sup>?

83. A licensed publican refused to serve a party of negroes with refreshments simply on the ground of their colour. Have they an action of damages against him? Do publicans stand on the same footing as innkeepers as regards the obligation to supply the public with refreshments?

84. A commercial traveller who was travelling on his principal's business puts up at an inn. While he was there his principal sent him parcels of goods for sale. The innkeeper when they were received was well aware that they belonged to his guest's employers. Can the innkeeper detain the goods if the guest fails to pay his bill? Or if they are stolen, is the innkeeper liable, and to whom?]

<sup>1</sup> Cf. *supra* I, Nos. 35 and 59.



### III

## IN HIRED APARTMENTS

1. A STUDENT who did not come up to the University till May 25, four weeks after the commencement of the academic session (*Semester*), hires an apartment at £3 for the 'session'; how long can he remain in it? During the autumn holidays? Up till the fourth week of the new session—to November 25<sup>1</sup>? 2. Can the lessor, if no special arrangement is made, demand pre-payment of the rent? 3. What security has he, if he does not get paid? Does his security extend to books sent to the hirer on approval, to a piano lent to him? 4. Has he also a claim against the student's father? 4 a<sup>2</sup>. Is the contract effectual if the student is still under age? 5. Can the hirer, having been called away during the session, sub-let the apartments to another? 6. If he has power to do this, can he do so without any regard to the character of the sub-tenant? Could he, for example, sub-let to a trumpeter, who by his musical exercises drives every one in the building wild, or to a loose woman, or to a family of the working class? 7. Is it an illegal act of self-help for the landlord to refuse admission to such persons, or to turn out into the

<sup>1</sup> i.e. the corresponding week of the next academic session. The above questions are framed on the footing of an academic year being nominally divisible, as is the case in Germany, into two periods of six months ('Semester'), a summer and winter session. The answers obviously depend upon the meaning to be attached to the word 'Semester' in the contract.

<sup>2</sup> From 12th ed., No. 5.

street things they have brought to the house unknown to him?

8. A student, who had paid at a small German University £4 a 'Semester' for his apartment and has gone to Vienna to continue his studies, hires a room there for forty florins Austrian currency (= £3 5s.). After concluding the contract he learns that the rent is a monthly one, while he had supposed it was for the 'Semester'; is the contract binding? Can the lessor not meet the plea of the hirer that there was a mistake with the answer that the matter here relates to local customary law (monthly term), and that error in law excuses no one?

9. Two students hire an apartment jointly for thirty shillings a month; is each of them liable for the whole of the rent? 10. Assuming they had expressly bound themselves *in solidum*, does this liability apply only to the rent or also to damage done by one of them? 11. Where there has been no agreement about liability *in solidum*, and both are chargeable with the same fault, e.g. on the ground that they left a light burning when they went out by which things were burned, can the landlord choose which of them he will sue? Has the one who pays a right of regress against the other? 12. Can the landlord, after having first made a claim for the whole amount against one of them, but recovered only a part of it, afterwards sue the other for the balance? 13. In the above case a mistake occurred in regard to the room<sup>1</sup>. One of the two friends, A, who first came to the house, fixes on the room a, and remarks to the lessor that he wishes to take it for himself and

<sup>1</sup> This case is taken from a work of Leonhardt, *Der Irrtum bei nichtigen Verträgen*, I. p. 174.

his friend *B*, but that before doing so the latter wishes also to see whether it will suit him. When the latter arrives the lessor is out, and his wife shows room *b*, in the belief that this was the one chosen by *A*. Both friends afterwards send notice by a porter that they will take 'the room,' and thereupon bring their trunks. How is the case to be decided? The landlord maintains that room *a* has been hired, because it was the one originally intended by both parties; *A*, for his part, admits this, and demands that room upon payment of his share of the common rent, i. e. fifteen shillings; *B*, on the other hand, demands the room *b*, on which he had fixed, likewise upon payment of fifteen shillings; the landlord, on his side, demands from each thirty shillings, in case he has to give both rooms. 13 *a*<sup>1</sup>. A North German student writes to a house owner in a university town in South Germany, engaging 'the room on the first storey,' he having had it recommended to him by a fellow student on account of the beautiful view from it. On his arrival he finds reserved for him a room not, as he contemplated, one stair up but on the ground floor and without any view, 'first storey' in the ordinary language of that district meaning the ground floor. Which room must be held to be let? 14. A person, on the outlook for a quiet residence, inquires of a lessor, with whom he is bargaining (explaining to him at the same time his object), whether there are in the house itself or in the neighbourhood any 'noisy trades' carried on, and gets from him satisfactory assurances. Afterwards it turns out that in the courtyard there is an emporium for the sale of wild animals, in which the beasts make an intolerable noise; may he leave the house? The

<sup>1</sup> From 12th ed., No. 14.

landlord objects to his doing so, on the ground that by 'noisy trades' the exercise of some kind of handicraft can alone be understood. 15. A lessor inquires of a lady, who wishes to hire a flat from him, whether she has any children, and she answers in the negative with the words—she is unmarried. Afterwards he learns that the lady keeps a children's school, and he notifies her that he does not hold himself bound by the contract; she, on her side, asserts that the assurance given by her, that she was unmarried, was true, and she could even have given a direct negative answer to the question whether she had children.

16. A person has hired a residence for the summer: can he throw up the bargain on the ground that in the meantime small-pox has broken out in the neighbourhood?

17. On removing from a hired dwelling the previous tenant has, with permission of the incoming one, left behind him in the cellar some empty wine bottles, which are to be afterwards removed; is this a *depositum*? 18. How, if he has done it without permission? Can the new tenant throw out the bottles into the yard? If he has them put into another suitable place, can he charge warehouse rent and also for the labour of removing them? By what action can the previous tenant compel delivery of them, can it be only by a *rei vindicatio*? 19. The tenant, a horticulturist, has laid down a hotbed in the garden; can he take it away with him? Also the heap of compost earth, planted rose-bushes, fruit-trees? 20. A person intending to hire apartments, inquired, after looking at them, what business the landlord carried on, and is told by the latter that he is a merchant. He learns afterwards that he is a soap-boiler, and that the

dwelling has been hitherto generally avoided, owing to the unbearable smell of the soap materials. Can he dispute the contract on the ground of untrue *dicta promissa*? The landlord maintains that in the sense of the General Commercial Code<sup>1</sup> he is a merchant.

21. It is bargained that the tenant is to keep no dogs and is not to play on musical instruments; he disregards the agreement, and pleads that such agreements are not binding as no pecuniary interest, which alone can claim protection from the law, is involved in them, l. 33 *pr. ad l. Aquil.* (D. 9. 2) *non affectiones aestimandas esse*, l. 9 § 2 *de statulib.* (D. 40. 7) *ea in obligatione consistere, quae pecunia lui praestarique possunt*. The lessor brings an action, and claims that the tenant should be interdicted under penalty from further breach of the agreement, and that in respect of what has already been done a sum of £5 should be paid to him by way of satisfaction; how should it be decided? 22. The tenant himself is not musical, but his daughter is, he does not keep a dog himself, but his son does; he maintains that as regards these persons he has undertaken no obligations.

23. At a party given by the tenant the house is damaged by one of the guests; is the tenant legally responsible for this? Texts bearing on the question are—for hiring, l. 11 *pr. loc.* (D. 19. 2)<sup>2</sup>, and for usufruct, l. 65 *pr. de usufr.* (D. 7. 1).

<sup>1</sup> i. e. the German *Allgemeines Handelsgesetzbuch*. As to English law, see Com. Dig. Merchant (A); *Josselyn v. Parson* (1872), L. R. 7 Exch. 127.

<sup>2</sup> 'Videamus an et servorum culpam et quoscunque induxerit praestare conductor debeat? . . . et adversus eos quos induxerit utrum praestabit tantum actiones an quasi ob propriam culpam tenebitur? Mihi ita placet ut culpam etiam eorum quos induxit praestet suo nomine, etsi nihil convenit, si tamen culpam in inducendis admittit, quod tales habuerit vel suos vel hospites.'

23 a. By a hailstorm or an explosion the windows in the dwelling are smashed; who has to mend them, the landlord or the tenant? 23 b. Is the case the same where windows which have been opened and duly fastened, are shattered by a sudden hurricane? 23 c. Is it the same where they are broken by the populace, the tenant having given occasion to this by remarks or conduct which enraged them? Is it a point of importance whether the bitter feeling was justified or not, and whether the tenant was rightly or wrongly accused?

24. Can the circumstance, that the lessor himself is in arrear with the rent he pays to the proprietor of the house, have disadvantageous consequences for the lessee? 25. May the lessor, in respect of a money loan to the lessee or outlay on his behalf, prevent removal of his *invecta* and *illata* when he gives up the occupancy? Does the provision of the *constitutio Gordiana* in l. *un. Cod. etiam ob chirogr.* (8. 26 (27)) apply to this case? 26. What remedy has the lessee for groundless retention of his *invecta* and *illata*? 27. The lessor of furnished apartments claims compensation for a mirror broken during the tenancy, the tenant asserts that a maidservant of the lessor broke it; has the former, in order to establish his claim, to prove that the tenant himself broke it, or the latter to prove that it was the maidservant? 28. Can the tenant plead by way of set-off that things of his have been stolen by the landlord's maidservant, who had to attend to the cleaning of the rooms, or 29. by a workman who has been employed by the landlord to do some repairs in the room unwatched, or 30. by the landlord's children? Can the landlord repudiate liability (in this last case) on the

ground that noxal actions, as regards children, were abolished by § 7 *de nox. act.* (I. 4. 8), or that the children are still *infantes* or *infantiae proximi*, and so not legally accountable? 31. A person pretending to be a friend of the tenant has had the latter's room opened in his absence in order to get back books which he says he lent him; is the landlord responsible if such person turns out to be a swindler? 32. Can he be blamed for things taken if the person was known to him as a friend of the tenant, who had often waited for the latter in his room when not in? 33. Is it a *furtum* if the friend takes one of the cigars which he finds in the room and lights it? If he put a dozen in his pocket? 34. If the boy who brushes the boots or an ordinary workman were to do this, would they stand in the same position as a friend? 35. In this last-mentioned case would the *furtum*, which we must perhaps admit, be excluded by the fact that the boot-cleaner does not appropriate the cigars to himself but presents them to another person or allows him to take them, for instance a journeyman locksmith, whom he has had to call in to open a lock? The boot-cleaner in the last figured case has not himself touched the cigars; is this important as regards *furtum*? Can one not say, the act here is just as much without legal effect as if one were to permit anything else to be done which one has no authority to permit? 36. Is the boot-cleaner liable to an action if he, without expressly authorizing the taking of the cigars, notices it and holds his tongue about it? Would this lay him open to a charge of *furtum*? 37. Does the journeyman locksmith commit *furtum*? He relies upon the permission he got from a person representing the tenant.

38. The landlord has taken charge of a packet for the tenant; can the latter sue him for its delivery by *act. conducti* or by another action? 39. Can the former exercise a right of lien over it in respect of his claims under the lease? 40. Or in respect of a payment in cash made to the person who delivered it? 41. Must the tenant make good the last-mentioned outlay, even though he himself is unwilling to receive the packet? 42. Many of the doors in the dwelling are without keys; can the tenant require the lessor to supply them? The latter maintains that he is only under obligation to give possession of the dwelling in the state it was in at the time of the contract, at which date the keys were wanting—a fact that is to be assumed to be established. The tenant urges that the prestation incumbent upon the lessor extends to *uti frui licere*, to which the lessor replies that keys are not an essential for this, as the doors were standing unfastened. 43. The same question arises also in the case of sale of a house. It has been asserted (Bechmann, *Der Kauf nach gemeinem Recht*, ii. p. 374) that the seller, apart from special agreement, only requires to deliver such keys as are presently existing; is such the fact? In the sale of a trunk or fire-proof iron safe must delivery of the keys be made matter of special arrangement, and will the seller be relieved from delivering them, if he prove that before concluding the contract he had lost them? Keys for a fire-proof safe are usually rather expensive to make. Do the two cases, the sale of a house and that of an iron safe, stand upon the same footing? The seller of the house disputes this, since one can make use of a house even without keys, but not an iron safe. Is this true? Does it hold



good for the key of the main door, of the wine-cellar, of the garret-room, or, in an hotel, of the separate rooms? Assuming that in an hotel with 100 rooms the keys of 50 rooms are awanting, has the purchaser to get them made at his own cost? 44. If the circumstance, that nothing was thought about the keys at the time of contracting, should free the seller from the obligation to have those that are awanting manufactured, could he not also on the same ground decline to deliver those in existence<sup>1</sup>?

45. The lessee, who dwells along with the lessor himself and several other tenants in a flat, which is shut off from others by a locked corridor, has lost his corridor key, the lessor insists that the lock and all the corridor keys shall be changed, the tenant is willing merely to provide a new key for himself; who is right? 46. May he consistently with good faith keep silence about the loss or have a new one made for himself without knowledge of the lessor? 47. Either he himself or a stranger, who has just quitted him, has left the door of the corridor standing open and a thief has seized this opportunity to steal something of the lessor's; is the tenant liable or the stranger? 48. A friend of the tenant, who waited in his room for him, but had to leave before his return, opened the outer shutters but did not fasten them, and they were smashed by a gust of wind; is he liable? He repudiates liability on the ground that in non-contractual relations one is not bound for *culpa in non faciundo*. 49. A seamstress, who does work for a private employer, comes to the flat with a cloak, which she intends to leave in the latter's chamber. She is directed by the employer to leave

<sup>1</sup> See *l. 17 pr. de A. E. V.* (D. 19. 1), and *l. 19 § 2 locati* (D. 19. 2).

it in the landing, and to her inquiry, whether it might not be stolen, she gets the answer—'Just put it down there.' The cloak is stolen; is the employer liable? 50. In lighting a cigar near a curtain the tenant has set the house on fire, the tip of the lucifer match which he was using having suddenly broken off and set the curtain ablaze; he repudiates all liability because the bad quality of the match, which we may take as proved, has been the cause of the fire. 50 *a*<sup>1</sup>. Is the lessor of an upper floor bound, apart from special agreement, to look after the lighting of the stair, and liable in damages accordingly if, owing to the want of such lighting, the tenant or a member of his family falls and breaks his leg?

51. A friend of the tenant is forbidden by the landlord, to whom he has shown some rudeness, to enter the house; must the tenant submit to this conduct? 52. Or the landlord denies that the tenant is at home when the friend calls; is there any legal remedy against this? 53. Is the personality of the caller of importance in this matter? Suppose, for instance, that it is a woman of loose character. 54. The landlord, who has given the tenant a house-door key, is annoyed by the tenant coming home late at night and disturbing his sleep; in order to compel him to come home earlier he bolts the door instead of merely locking it. Has the tenant a right by his contract to insist that the door be left locked? The landlord takes up the position that he has given no assurance to this effect in the contract. On several occasions the door was not opened at all to the tenant, and he had to spend the night in an hotel; can he claim

<sup>1</sup> From 12th ed., No. 59.

damages on this account? 55. The landlord has taken the house-door key out of the tenant's apartment, in order to compel him to come in at a reasonable hour; is this *furtum*? The landlord asserts that he is owner of the key; is this the right ground of defence? Does this fact restrict the tenant to an action on the contract?

56. A tenant living in the upper storey makes use of a foot-scraper belonging to the tenant in the lower storey, or a door-mat, placed there by him for the purpose of cleaning his feet. What remedy by Roman law has the latter against this? The *act. legis Aquiliae*? The *act. negatoria*? 57. Newspapers intended for one of the tenants are in his absence laid down on a table in the vestibule by the postman and are read by another tenant. If the former forbids him to do this, and he disregards the prohibition, what action may be raised against him? 58. Ivy on the balcony of the upper tenant sends its shoots downwards and thereby conceals the signboard of a tradesman on the lower floor; must the latter submit to this? Can he sue for disturbance of possession, or in what way can he proceed? 59. May the tenant (handicraftsman, tradesman, photographer) place on the outer wall of the storey occupied by him (first, second, or third) a signboard or a case of photographs? 59 a. The tenant of the upper storey frequently gives dancing-parties, which shake the ceiling of the tenant below so violently, that the plaster falls from it upon his furniture and even into his food, and his chandelier is swayed about. Can he insist upon the landlord protecting him against this? Has the landlord a right to prohibit an upper tenant from using his apartments in such a way? The latter maintains

that it is open to every one to have dancing in his residence. 59 *b*. Can the lower tenant himself sue the upper one directly, if the landlord declines to do so? Perhaps by the *actio negatoria* or the interdict *uti possidetis* on the ground of disturbance of possession? 59 *c*. Can he demand from him *cautio damni infecti* to guard against the event of his chandelier falling down owing to the violent shaking of the ceiling? 59 *d*. If the landlord does not intervene to protect him, can he remove from the dwelling and deduct a proportion of the rent for the period of the tenancy yet to run?

60. The landlord has caused a scaffolding to be placed on the steps of the cellar, which hinders the tenant from putting into the cellar a large cask of wine that has come for him. The latter requests the landlord to have the scaffolding removed, and, on his refusal, has it done by the men who have to put the cask into the cellar. What action can the landlord bring, one simply on the contract? the *uti possidetis*? Any other action by Roman law? Has the tenant any defence? Can he plead that the landlord should go against the persons who actually removed the things? Are they liable?

60 *a*<sup>1</sup>. A person hired a shop. Before he got possession the lessor sold the whole building to a third party, but offered at the same time to provide the hirer with a shop of equal value in quite as good a business locality elsewhere. Must the hirer be content with this? is an offer of this kind wholly without importance?

61. Has a tenant, who is obstructed by another tenant in the use of places destined by contract for

<sup>1</sup> From 12th ed., No. 72.

their common benefit (loft, cellar, stairs, scullery), a direct action against him? 62. Is there any remedy (direct or indirect) open to him to stop disorderly conduct of another tenant in the latter's own flat which causes him discomfort (shaking of the floor, noises at night, trickling of fluids, and so on)? The latter asserts every tenant can do or not do what he pleases in his own flat. 62*a*. Assuming that by Roman law in both cases (61, 62) a direct action by the one tenant against the other was incompetent, should modern law follow this? Was the Roman law, speaking generally, right in affording such limited remedies as it did to lessees of lands and other subjects? 63. The tenant of a dwelling-house, occupied by him for several years, failed to inform his landlord that dry rot had got into it, the latter only became aware of it after the tenant's removal; can he sue the tenant for want of due *diligentia*? A German court gave judgment against the tenant: was it right or wrong?

## IV

### HOUSEHOLD AFFAIRS

1. How is the pocket-money which a father gives to a son to be regarded? Is it *peculium profectitium* in the sense of Roman law? 2. How, as regards clothes, books? 3. Are they to be regarded as a present by the father? 4. Does the son become owner of them? 4 a<sup>1</sup>. How do matters stand if the mother, without knowledge of the father or against his declared wishes, provides an addition to the son's pocket-money? How if she applies for this purpose any surplus of the money she gets for household expenses? 5. May the son, without permission of his father, sell such school-books as he has no further need of, owing to his having been moved up a form in the school? 6. Is the second-hand bookseller *in bona fide*, who buys them from him without satisfying himself of the previous consent of the father? Or a person who buys from him, say, a *corpus iuris*, the collected statutes, Goethe's works? 7. Does the son become owner of things that are presented to him by a third party? Can he alienate them without permission of his father? Does he need the permission of his father in order to accept a gift? Must the son be a minor before he can so accept? or *pubertati proximus*?

8. Must the father pay the debts of the son? 9. Must he, in order to escape such obligation, make an announcement in the public prints that he will

<sup>1</sup> 12th ed., No. 4.

not be responsible for them? 10. If the father of his own accord pays the debts of the son who is under his power, is this to be regarded as a present to the creditor or is it by Roman law the fulfilment by the father of a *naturalis obligatio* of the son, or of himself? 11. What is essentially the legal nature of this act as regards the son, that of a *negotiorum gestio* or a donation? Can the father thereupon appoint that the amount he pays shall be (after his death) brought into hotchpot by the son, or be imputed to his *legitim*, or can he take a document of debt for it which will be legally binding? Can he do the same with respect to the costs of the son's education? 12<sup>1</sup>. Are the following things, when presented to a child by a third party, acquired in usufruct by its parents:—money? books? a mantilla? a travelling-bag? a pair of spectacles? 12*a*. Does the salary of a clerk and his bonus at Christmas fall under parental usufruct? the pay of a lieutenant in minority?

13. A person of full age, who erroneously supposed himself to be a minor, has made an alienation which, had he been in minority, would have been invalid; is it effectual? He disputes it on the ground that the will necessary on his part to produce legal consequences is wanting. 14. If matters were reversed, would the mistake be of consequence? 15. A girl in minority, whose guardian remits to her pin-money for defraying the expenses of her toilet, obtains things on credit at a milliner's; must he pay the bill? He asserts that she is plainly incompetent

<sup>1</sup> No. 12 of the 8th ed. has been omitted as inapplicable to Roman or English law. This and the next question are from the 12th ed. (Nos. 13 and 14).

to incur any debts. 16. Does this apply also to the apothecary and physician? 17. Can the school-mistress, who has summoned a doctor for one of her boarders and has the prescription made up by an apothecary, be called on to pay for it?

18. A daughter has made a present of some articles of her parents to her maid, which the latter knows to be such; can the maid acquire them by prescription? She asserts she has been *in bona fide*, because she was entitled to assume that the daughter had done it with assent of her parents, and, if not, that their assent was subsequently given tacitly in that they had not asked the articles to be given up at the time of her leaving their service. Would it have been of importance that the parents had seen the articles in her possession, e. g. a cast-off dress of the mother's, or an old shawl of her's that the daughter herself was in the habit of wearing?

19. A mother sends her child, aged six, to the butcher to get a quarter-pound of sausages, the child asks for four pounds instead of a quarter-pound, and on its way home a big dog snatches them from it; the mother declines to pay, first because she cannot become bound through a child, secondly because her order only applied to a quarter-pound, thirdly because the sausages did not reach her at all; can the owner of the dog be sued?

20. Is it a case of mandate when a husband hands to his wife money to defray household expenses?

21. Does any balance over belong to the wife, or on what legal principles is the husband's claim for it to be decided? 22<sup>1</sup>. Is money for dress which he

<sup>1</sup> Texts of Roman law bearing on this and the two following questions are l. 31 §§ 8-10, et l. 42 *de don. inter v. et u.* (D. xxiv. 1).



hands to her to be regarded as a gift? 23. Does the balance not expended by her belong to herself or can the husband ask for its return according to the rules of the *condictio ob causam datorum*? 24. Are the birthday and Christmas presents customary between spouses invalid by Roman law? 25. Must the husband pay debts incurred by the wife? Can a simple affirmative or negative answer to this be given by Roman law? Does the same rule apply to the jeweller's account as to accounts of the butcher or baker? 26. The wife allows her husband to take the interest of her paraphernal property; does this constitute an invalid donation between spouses? 27. May a husband open bills or letters intended for his wife? Weighty reasons for this may exist. 28. A sister manages her brother's household; is that a legal relationship—perhaps one of mandate, or, seeing she thereby gets her board for nothing, an innominate contract?

29. The wife engages the servants; can the husband be sued in respect thereof, and how is his liability in such case to be established? 30. The wife has promised the registry woman (who by police regulations receives a fixed payment of one shilling from both the employer and the servant for the services rendered to them) a 'handsome reward' if she directs her to a good cook. Is such a contract known to Roman law? 31. Is the wife bound to pay more than the legal tariff? Can she base her refusal to do so on (1) that the payment being fixed statutorily, the other party cannot accept more; (2) the taxed sum is itself a 'handsome reward'; (3) her promise is null owing to the indefiniteness of the object? 32. What consequences ensue if some one advertises in a public

print, 'An honest and respectable cook with good recommendations will obtain an immediate engagement in my service at wages of fifty shillings a month,' and a person, whose possession of these qualities cannot be disputed, makes application for the place; must he take her, or can he refuse without stating reasons? In other words, is the advertisement to be regarded as a public offer, or what else?

33. The characters which employers give to their domestics on leaving their service are usually not quite consistent with the truth. If the new employer suffers damage owing to a character of this description (it was, for instance, said of a servant girl that she had served 'faithfully and honestly,' whereas she had been dismissed for frequent pilferings, and she continued this practice under her new employer), can the latter sue the former employer for damages? 34. Would it be material whether the new master or mistress had specially inquired as to her honesty?

35. By special statute in many localities the engagement of a servant must be straightway notified to the police<sup>1</sup>; is the validity of the contract dependent upon the observance of this regulation? 36. To what class of enactments would such a statute belong in the case of the answer being affirmative, and to what class if it be negative?

37. Is a servant girl compelled to allow money received by her as handsel (earnest money, arles, *arrha*) to be deducted from her wages? 38. Can a deduction from them be made if she is prevented by illness from doing her work? 39. Can she be immediately

<sup>1</sup> This is not apparently the case anywhere in Great Britain.

dismissed if she steals or is unable to perform what she has undertaken to do? 40<sup>1</sup>. Can the cook leave her service before the expiry of her term on the ground that she is going to be married? She urges that her betrothed has threatened to throw her over if she does not immediately give up her place. Must not the employer at least let her go in this case? 41. If she wishes (on this or any other ground) to give up her place, can she do so by offering to supply an efficient substitute? 42. Can the employer in this case detain her against her will or keep her things from her? 42 *a*. What action would the cook have to raise in order to compel restoration of her things? 42 *b*. Can the employer set up a plea of lien over them in respect of damages for broken crockery, or of money advanced towards wages, or of money given her to pay accounts which she has not paid, or of a money loan? 43. Is there any legal remedy by which such a breach of contract can be prevented?<sup>2</sup> 44. The master, who has discovered that the servant girl has been out of the house during the night, informs her that if it occurs again he will dismiss her on the spot; the act being repeated, the girl claims right to leave, asserting that she had received warning subject to this event. 45. A foreign cook, engaged by writing, is assured that should she remain two years in the service she would have her fare home paid for her. This she did, but instead of returning home she takes another place in the same locality; can she, when she afterwards desires to return

<sup>1</sup> No. 40 of the 8th ed. is omitted as relating purely to German law, and this, which is No. 43 of the 12th ed., substituted.

<sup>2</sup> Perhaps a quasi-possessory remedy. The rest of the above question is omitted as dealing purely with German law.

home, demand a free passage, or can she claim the expenses of the journey at the moment she left the service ?

46. Does the cook, who is given money for purchases or to pay bills, become owner of it ? 47. May she spend it for her own purposes, with the intention of paying the bills afterwards out of her own money ? 48. Does she make her employer liable when she gets goods in his name on credit for herself from tradesmen or merchants ? Does it make a difference in this matter whether she was empowered by her master or mistress to get things on credit from such persons, or not ? She has done it even after her dismissal from her place ; how is this act to be characterized in law ? Is the employer liable ? The employer has, more or less regularly, given money to the maidservant in order to pay cash to a tradesman from whom on other occasions he get things on credit ; is he liable if the maidservant has the things put down to his account ? 49. The maidservant, after she has been dismissed, has presented a note in the name of her mistress, a lady of education, to a tradesman with whom the latter dealt, in these terms : ' Mr. M. is requested to give the bearer ten yards of those merino as I was formerly supplied with ' ; is the mistress liable ? 50. The cook is sent by her employer to the annual fair to bring some kitchen-pots for him to look at. These are not returned till after the close of the fair, and the seller refuses to take them back ; the employer asserts that there was no time agreed on for their return. 51. On one of them there appear marks of its having been used ; does the use of an object sent out on inspection imply that the contract is concluded ? Is this plain ? Thus in the case of a book by reading it,

a violin by playing on it, a coat by trying it on? The mistress of the house asserts that she has done nothing more than this with the kitchen-pot. 52. During lengthened absence of the employer some necessary repairs have to be made or some necessary expenditure to be incurred, and the servant-maid employs the workman, or defrays the expenditure, obtaining the means to do so by borrowing from a friend of her employer, to whom she states the object; has the latter's claim to be directed against the employer or the servant, or can it be made against both?

53. Who acquires possession and ownership of the wares which the cook buys in the market? Is it material whether she has said at the time that she is buying them for an employer and whether she has given his name? 54. If she has bought, either by mistake or deliberately, a lot of goods, for example large supplies of sugar and coffee, at a different place from that to which she was told by her employer to go, is the latter bound by the contract? 55. The cook borrows from the cook of another family living in the same tenement some object of which she has immediate need (e. g. eggs or milk), without the knowledge of their respective employers; how is this transaction to be regarded in a legal view, i. e. what contract is created and what are its effects as regards the two employers? 56. Is it material that the two employers have forbidden their respective cooks to enter into transactions of this nature? Is the one employer bound by such borrowing of his servant, and can the other characterize as *furtum* the secretly handing over of articles against his will? 57. By the code of morals among cooks in many large towns there is no

wrong in the so-called market-penny (*Marktgroschen*)<sup>1</sup>—an enhancement of price made by cooks in their own favour upon everything bought by them—it is in the eyes of the cooks simply a perquisite falling to them, a kitchen tithe, whose amount (measured by the standard of the average amount of purchases) they actually compute beforehand, when entering into service. Have we here conditions sufficient to establish local customary law? 58. Also by the ethics of domestics there is nothing wrong in their taking by stealth and consuming tit-bits of food; is the Roman law in conformity with this view? Does the maxim—*minima non curat praetor*—apply here? 59. The chambermaid has during a lengthened absence of her employers made use of the toilet of her mistress, in order to go to a townspeople's ball; how is this act to be characterized legally? 60. The mistress insists upon the chambermaid making good to her the actual value of the dress, dancing-shoes, &c., that she used, while the maid will only agree to pay an insignificant indemnification in respect of the wear and tear; who is in the right?

61. The mistress is in the habit of buying game from a notorious poacher. Does she by Roman law become proprietrix of the game? 62. Or by modern law? 63. What character does Roman law ascribe to the purchase from the thief of goods that are known to be stolen? 64. Does property in stolen game, e. g. a roebuck, pass to the possessor thereof by being cut up, i. e. does the cutting-up imply the making of a new *species (specificatio)*? Would stuffing an animal be

<sup>1</sup> Also called *Körbel-Geld* (i. e. basket-money). It corresponds to secret discounts given to servants by tradesmen in England.

a *specificatio*? Or preparing the skeleton for a Zoological museum? Does an anatomist make a new *species* by making an anatomical preparation? 65. Does a cook make a new *species*, when she cooks, roasts, bakes, preserves fruits, makes coffee and tea? Are all foods and drinks, which pass out of her hands, in the like position in this respect? 66. On the hypothesis that there is actual specification in some of these cases, does she get the property in them as *specificatrix*? 67. In many districts it is an established custom that cooks acquire the property of the skins of hares cooked by them, where there is no arrangement to the contrary; can a cook regard herself as owner of the skin the moment she has taken it off the hare, and to what mode of acquisition must the case be referred (occupation? tradition? acquisition of property without obtaining possession?), or has she merely a claim based on obligation, and by what action can it be made good? 68. A widower hands over to his sister the management of his house; is that a relationship of a legal character? Is it perhaps a gratuitous mandate or, seeing she gets free board for it, an innominate contract (*do ut facias*)? 69. The seamstress who is engaged to come to her employer one specified day in the week takes away with her secretly from the house a novel, which she brings back the next time she comes; is there a *furtum* here? Is she liable if it be destroyed without her fault by *casus* while in her possession? 70. A washerwoman, hired to wash for the whole day, brings some of her own washing with her, which she secretly washes; how is this manner of acting to be described by Roman law? 71. Things given out to a washerwoman to wash are lent by her to third parties, after

she has washed them (in big towns this is done as ordinary business, people become regular subscribers to washerwomen for underclothing); what consequences does it involve by Roman law<sup>1</sup>?

72. The master gives a letter to his servant to take to a friend, and the latter hands his answer to the same servant; what is the position in both cases as regards acquisition of possession and property [in the letters]? 73. In the master's absence the servant is in the habit of reading the letters left in the unlocked drawers of the master's writing-table; is this to be regarded as a delict by Roman law? *dolus*? *furtum usus*? The servant urges in his defence that the fact of his master not having locked the drawers proves that he attached no importance to the letters being kept secret, and that therefore he had no interest at stake. 74. Would it be different if it were a case of the servant, for example, having been bribed by a business competitor of his master to betray to him by this means a trade secret of importance, or to communicate to him the addresses of valuable correspondents? Could an action also be brought against the person who bribed? 75. The servant, who announces to his master a call from an importunate traveller in the wine trade, is directed by him to send him away in a manner which is insulting? is he liable? The master seeks to excuse himself on the ground that owing to the importunity of the traveller, whom he has had often previously to send away, he had no other course but to treat him in such a manner that he would give up his inclination for such repeated visits, that in short he found himself driven to extremity. 76. Would it be a wrongful act, if the

<sup>1</sup> This strange practice is apparently not known in England.



master, where the traveller will not withdraw, though told that no order will be given him, were to threaten to summon his servant and have him turned out of doors? 77. The master, in the year 1902, gives the traveller an order for wine, which he has hitherto had supplied to him at three shillings a bottle, according to the price list of 1900 which had been sent to him. When he afterwards gets the bill the wine is put down at three shillings and sixpence a bottle, and on his raising an objection the firm replies to him that the price had been raised in the interval, as would appear from the enclosed price list for 1901. On his pleading ignorance of this price list the firm replies that he might have made inquiry whether the price was the same, that owing to the bad vintage the price of wines generally had risen, and that the insertion of the year in the wine-list expressly restricted its validity to the year mentioned. Moreover price lists could have no obligatory force, they contained no offer but merely a notification, the person sending them out in no way bound himself by them to provide the article at the price mentioned, he retained full freedom as regards the settling of the price. How should the case be decided? There are three possible views: the amount payable is three shillings, or it is three shillings and sixpence, or the sale is by reason of insufficient consent not completed. Assuming that the firm in the end, in order to terminate the dispute, declares itself ready to let the wine go at the old price, must the person who gave the order keep it or can he leave it on their hands?

78. The possessor of a large garden arranges with a market-woman to sell on his behalf in the market

the vegetables and fruit not required by him. How is the transaction to be described legally, when (1) they are to be sold to her at a fixed price, (2) she is to get a specified quota of the net proceeds, (3) she is to receive a fixed weekly wage?

79. An uncle appoints his niece to manage his household establishment for him. He tells her that she is to get no salary, but that after his death everything he has will come to her. He dies, leaving a testament in which he has made his brother his heir. Can the niece claim a recompense for the services she rendered during a number of years, and what action here suggests itself? The following is a similar case: a servant girl, who had served for a number of years with the same mistress, gets married and is afterwards employed by the latter to come once a week and scour the floors and clean up the house generally, which takes up a whole day; for this service the mistress has promised her to make some adequate return by remembering her children in her will. After the mistress's death it appears that this has not been done. The servant raised an action against the heirs in respect of failure to perform the promise, but was nonsuited, first because the promise was not made to her but to her children, and secondly because a promise to make a provision by will is as a rule without binding effect; can she not set up still another claim?

80. A shop assistant arranged for board with a private family, and the things to be included in the board were specified, but no mention was made of afternoon coffee. After the arrangement had lasted for several years, the charges for the board being always regularly paid by him each month, it came

to an end through a quarrel, and a claim is made against him for nearly £5 in respect of afternoon coffee which, without his having ordered it, had been offered to and accepted by him during the several years; is the claim well founded?

BY THE TRANSLATOR.

[81. A lady about to go abroad for a short period shut up her house and, in accordance with common practice, deposited her silver-plate with her bankers for safe custody. After an interval of some weeks the bankers received a note, purporting to be signed by the lady and written upon note-paper bearing her crest, in which it was stated that she had returned and the bankers were asked to hand over the plate to the bearer. They did so accordingly. The bearer turned out to be a swindler and the note to be forged. The lady, who knew nothing of what had happened till her return some time afterwards, brought an action for the value of the plate against the bankers. How should it be decided? The answer to the question obviously depends on the conception of degrees of *culpa*.

82. The wife of A deserts him and takes with her the silver plate and a number of the ornaments in the house. What remedy, if any, has A according to Roman law? according to English law?

83. A person purchases at a tobacconist's in a country town for fifteen shillings a small silver match-box, designed in the shape of 'Cleopatra's Needle' on the Thames Embankment in London, and having on it what seemed hieroglyphic figures copied from those on the said monument. Afterwards being

in London he takes the opportunity of comparing the figures on the box with the actual ones and finds that they do not correspond, the former turning out to be merely fancy hieroglyphs. He demands rescission of the sale on the ground of material error. How would the matter be determined by Roman law? Texts bearing on the question are l. 9, § 2, l. 11, l. 14, l. 41, § 1, and l. 45 *de C. E.* (D. 18. 1).]

## V

### AT A TAILOR'S

1. WHAT kind of contract is made with a tailor, where the customer, who has been measured for a coat, himself supplies the cloth? 2. Does it by Roman law make a difference whether the total cost for the workmanship and other things required is settled by agreement beforehand or not? 3. In the latter case can the tailor charge as high as he pleases? 4. Must the tailor bear the responsibility if his cutter, in cutting the cloth delivered by the customer, spoils it? Is he, as regards the cutter, liable merely for *culpa in eligendo* or for simple *culpa*? 4 a. Assuming he is liable for simple *culpa*, does it follow that a guardian, who in a lawsuit affecting his ward employs a solicitor, becomes responsible to the same extent? Or if the guardian can only be made liable for *culpa in eligendo*, is the same rule consequently to be applied to the tailor? Are the two cases on all fours? 5. Can the tailor demand to be reimbursed for the workman's wages, if the coat is destroyed by accident while being made, e.g. by an outbreak of fire? 6. Can he retain the coat till payment is made?

7. What is the nature of the contract, where the tailor himself supplies the cloth? 8. So far as regards risk or responsibility for defects is this case distinguishable from the one above mentioned? 9. At what moment does the risk pass to the customer: when the coat is ready? when the apprentice leaves

the shop in order to deliver it? when he has delivered it? Does it make a difference whether the apprentice has delivered the coat personally to the customer, or has left it with his servants in his absence? 10. Assuming that the customer has rejected the coat, because it did not fit him, or has handed it back to the person who brought it for the purpose of having an alteration made on it, who bears the risk? 11. From what legal standpoint are we to regard this sending back? Is there *mora accipiendi*? 12. Can the point of view of defective *dicta promissa* be brought to bear on it? 13. Where a coat has been promised to a customer by a fixed date or for a special occasion (e.g. a confirmation, or marriage, or ball), is he still bound to accept delivery after these are past? 14. Would it be taken into consideration in such case, that the tailor was prevented from making timeous delivery by unavoidable hindrances (e.g. a general strike of the journeymen)? 15. If no date for delivery is fixed, can the tailor take as long as he pleases? What rights has the customer, if the tailor delays delivery? 15a<sup>1</sup>. The tailor demands for the coat on delivery the usual price of £2, asserting that there was no agreement about the price. The customer will only pay £1 15s., asserting that this price was agreed on. Who must bear the burden of proof?

16. May the receiver of the coat pay the amount of the bill to the apprentice who brings it along with the coat? Does it make a difference, as regards this, whether the bill was receipted or not? The apprentice loses the receipted account, and another person having found it gets payment of it; must the customer pay over again, seeing he has paid to the wrong person?

<sup>1</sup> From 12th ed., No. 17.

16 *a*<sup>1</sup>. How, if the apprentice, when he brought the receipted account, was obviously drunk and in this state lost the money received by him? 16 *b*. Is a person authorized to receive payment entitled to substitute another in his place? 16 *c*. The customer has, in absence of the master, paid a journeyman, who has embezzled the money. Can the journeyman meet the master's action against him by a claim of compensation for overdue wages?

17. In whom is the property of the undelivered coat, when the customer has himself provided the cloth for it; is it his or the tailor's? This depends upon whether, in the making of a coat, a new species is created and, if this is answered affirmatively, whether we hold that the tailor or his journeyman, who has made the coat, is specifier in his own name or in that of the customer. 18. How as to the property, when the tailor has supplied the cloth? 19. Does the property by Roman law pass to the customer immediately upon delivery of the coat (even without payment), i. e. does the bare delivery of the same involve a giving of credit? Is there a giving of credit if the account is not sent with the coat, where the tailor is in the habit of sending in his accounts half-yearly?

20. If a person has bought a coat at an emporium for ready-made clothes, and afterwards finds out that it has been already worn, can he return it on the ground of essential error? 21. Or on the ground of latent fault? 22. Are there not tacit *dicta promissa*? In a shop for ready-made clothes must one obtain an express warranty that the clothes, that are here offered cheap, are none of them second-hand? 23.

<sup>1</sup> This and the two following cases are from 12th ed., Nos. 19-21.

Would quite the same rule apply if one had bought the coat at a slop-shop? 24. Or at an auction of a deceased person's estate? In the latter case would a condition made by the buyer, duly proved, that the coat had not hitherto been worn, make it possible to set aside the transaction?



## VI

### AT A BOOKSELLER'S

LEGAL relations to which a book gives rise. 1. Its publication depends upon the contract between author and publisher. Is this to be regarded as sale of the manuscript? 2. Has the publisher a right to the manuscript as such, after he has used it, or must he return it to the author? 3. Is the obligation of the publisher merely one of paying the author the honorarium agreed on? 4. In what does it consist, if no honorarium has been fixed? 5. How is the act of a publisher to be regarded in law who, instead of the 1,000 copies he is authorized by the contract to print, prints 1,200? is it a delict-*dolus* possibly, or *furtum*—or a mere breach of contract? 6. Such an act may also be conceived independently of any contractual relation, as, for instance, where one pirates a book belonging to another without authority. How would a Roman jurist have characterized this act? is the notion of *furtum rei* appropriate? 7. Can the publisher or the author vindicate such unauthorized copies as his property? 8. As the property does not pass in sale till payment of the price or giving of credit, how do matters stand when neither the author's honorarium has been paid nor credit given, i.e. to whom does the edition belong, till this takes place—to the author or the publisher?

9. Does the publisher acquire the property in the copies of the book, when the paper does not belong to him, in other words does printing involve a *specificatio*—

tion? How does it stand with writing in this respect? Is printing on the same footing with writing? Can the paper-maker, who has not given credit for the paper delivered and has not yet been paid the price, vindicate the existing stock of copies as his property, in the event of the publisher's bankruptcy? for even should one hold that the printing involved specification, this, in the case before us, was done *mala fide*, as the paper should not have been used by the publisher before the price was paid.

10. Does one who buys a book at a bookseller's come into any legal relation with the publishing house? 11. If he gives such bookseller a commission to order a book for him which is not in stock, what legal relation is created? A contract of mandate? 12. How are we to regard the legal relation that arises when books are sent by the bookseller to customers on approval? is there deposit, commodate, an *emptio 'si placuerit'* (or '*nisi displicuerit*'), a *pactum de contrahendo*? The same question arises with regard to books sent *à condition*<sup>1</sup> by the publisher to the bookseller. 13. Is the party receiving them responsible in each of these cases for *culpa lata, levis, casus*? Is this not too general a question to admit of a definite answer; does it not depend upon the form of the transaction, e.g. whether the forwarding of the books has been in consequence of an order by the recipient, and whether the order was for the first time or repeated? 14. A customer has had a book bound that was sent to him on approval, subsequently he receives a copy from the author as a present, which he thereupon returns to the bookseller in place of the first one; the latter refusing to receive it, the

<sup>1</sup> i. e. on sale or return.

buyer maintains that books are fungible things. 15. An article which takes up a whole number of a magazine is afterwards published separately with a special title-page, upon which, alongside the title, the name and volume of the magazine is given. A subscriber to the magazine has had sent to him by a bookseller, on whose list he is entered as a subscriber, a copy of this separate edition, and he, supposing it to be a number of the magazine, cuts its leaves and makes notes in it, the regular magazine number being only sent to him some days later. He refuses to pay for the separate edition, maintaining that there has been *dolus* in the magazine part being sent later than the other, and that at any rate he was in essential error. Does anything turn upon the point whether the error in the case before us was an excusable one<sup>1</sup>? 16. The messenger of a bookselling firm is in the habit of laying down packets of books, sent on approval, on a table in the entrance lobby of the person to whom they are addressed, and one of them is stolen from it; who has to bear the loss, the bookseller or the customer? 17. Can the customer keep the books by paying the price, supposing the bookseller wants them back owing to his having promised to let some one else have them? 18. Must he keep them if he has cut their leaves? or dirtied them? 19. If this could not for various reasons be maintained, would the customary notice on the invoice—'Books soiled or cut will not be taken back'—have this result? 20. Is the soiling or cutting to be here regarded as the expression by acts of the consent necessary to the creation of the contract? 21. If this were correct, might not one then treat damage

<sup>1</sup> As slightly altered in 12th ed., No. 6.

to or destruction of goods, that are exposed for sale (e. g. earthenware and fruit on market stalls, bottles of wine and edibles on the buffet of a restaurant), from the point of view of sale? Is one supposed to buy the bottle of wine or the earthenware pots that one upsets by inadvertence? Seeing that one must pay for them in either case, the question seems quite an idle one, or may it not be so? How, if the perpetrator was found to be not conscious of his acts?

22. On the invoice accompanying the packet of books there is a notice—'Books which are not returned within a month are taken to be accepted.' Is this one-sided proviso binding on the purchaser? Is it perchance of consequence whether the customer is an old or a new one? Is the latter under any obligation to send back books, sent to him from various bookshops without having been ordered, or may he not let them lie till they are called for? 23. The following case may throw light on this last question. In recent times it has become a practice for importunate cigar manufacturers to send out lists of their current prices to persons at a distance, whom they don't in the least know, with a notification that they will take the liberty of sending them a specimen box, if they don't hear to the contrary. By not answering such a communication does one bind oneself to keep what is sent? 24. Would it be a material point in the before-mentioned case, that the bookseller has not hitherto remonstrated with his customers for delay in sending back the packets of books, and now wishes in an individual instance to take advantage of the above proviso?

25. An acrimonious review can quite ruin the sale of a book. Have not authors and publishers an

action against the writer of the review, at least where the latter is unfair and malicious, or where, as by no means seldom happens, he has pronounced judgment on the book without having even read it? 26. On the other hand, do unduly laudatory announcements, often prepared by the authors themselves, impose an obligation upon the publishers, towards the buyers of the book thereby misled, in respect of failure of *dicta promissa*? Or an assurance contained in the title, e. g. 'Completely exhaustive description,' &c., 'Compilation of the most recent railway time-tables,' &c.? 27. Defective information in collections of this sort, calendars of term days, Stock Exchange lists, and many others, can cause the greatest damage to persons who trust in them; can such persons have recourse against the bookseller from whom they bought the work? Or against the publisher? Or against the author or the press reader, should the fault be due to them? 27 *a*. In guide-books there are not unfrequently to be found unfavourable notices of hotels, which have the most damaging consequences by preventing visitors coming to them; has the owner of the hotel an action of damages against the publisher in respect thereof? Has the latter to prove that the statement is justified, or the former that it is unfounded, and would the publisher make out his case by producing letters from travellers who have complained of the hotel (dirtiness, extortion, bad service, &c.)? How ought he as a cautious man to frame the statements which he is extracting from these communications? 28. How, if a publisher allows the copies of an edition, which has found no market, to appear with a new title-page as 'Second Edition'? Must one, who has ordered a copy of this edition,

keep it? Is this case similar to the above one? Also how is it, if the second edition is described as 'improved,' while the alterations to be found in it are anything but improvements? 29. When a person has been supplied by a bookseller with a literary production that is undeniably worthless, can he afterwards, in respect of such worthlessness ('latent faults and defects'), return it (*act. redhibitoria*)? 30. Or in respect of *laesio enormis* or of error regarding its qualities? 31. A forester became a subscriber to a 'Lexicon of Indo-Germanic Roots' in the belief that (instead of roots of words) it dealt with botanical roots; an officer ordered at a second-hand bookseller's the Germanist work of Albrecht, *Über die Gewere*<sup>1</sup>, in the belief that it was concerned with fire-arms; is the contract null in these cases on the ground of essential error? 32. When a bookseller follows the practice of giving a certain discount to his customers, and some one has ordered books of him without mention of discount, can he charge him the full market price or must he allow the discount? 33. A purchaser afterwards resold to a third party certain books for the 'half of what they cost him,' and he put down the market price as the cost, asserting that discount allowed to him by special favour of the seller is not to be taken into consideration in a question regarding the amount of the purchase price. 34. A lady, who is shy about purchasing in her own

<sup>1</sup> 'Die Gewere, als Grundlage des ältern deutschen Sachenrechts,' by Professor W. E. Albrecht, 1828. *Gewehre* (plural of *Gewehr*) commonly means fire-arms, but *Gewere* is a technical term of old German law and is used by Professor Albrecht in the sense apparently of warranty or warrandice (*waranda*). We might parallel the above cases by that of a theologian in England who purchases a work on Equity, entitled 'Election, Redemption, and Conversion.'

name a certain novel of a risky character, makes use of the services of a male acquaintance for the purpose. Afterwards the two quarrelled, and the gentleman, to whose account the book was entered at the bookseller's, communicated to him the state of affairs and requested him to send the account to the lady. The following questions have to be answered: (1) Must the bookseller make a claim against the lady instead of the gentleman? (2) Can he do so, if he cannot recover the price from the person who gave the order? Or, even apart from this condition? (3) Can he revindicate the book in question as his property? (4) Is the indiscreet action of the gentleman towards the lady one that the law can take notice of?

35. Does the binding of a book involve any change in the property of it, i.e. does it operate as specification? 36. If it appears, when my book is being bound, that a sheet is wanting, can I thereupon insist that the book be taken back as defective? The bookseller proffers subsequent delivery of the sheet, must one content oneself with this? 37. Can one bring a direct action for the latter, and on what grounds would the claim be based? 38. Can one proceed against the publishing house, or must one sue the bookseller from whom the copy was obtained? 38 *a*<sup>1</sup>. *A* has on the request of *B* sent a book belonging to *B* to his own bookbinder to be bound, without informing the latter that it is not his property. What claims have *A* and *B* respectively, if the bookbinder damages the book? Can *A* claim damages, although he personally suffers no damage?

38 *b*. Is a publisher responsible in respect of libellous statements regarding another writer with which

<sup>1</sup> From 12th ed., No. 32.

the author is chargeable? Or is the printer, or setter of the type, or corrector for the press? 38 c. Is the case the same, where the editor of the advertisement sheets of a newspaper admits libellous advertisements?

BY THE TRANSLATOR.

[39. A circulating library sends out to its subscribers in ordinary course of business a book which is afterwards discovered to contain a libel. Can the proprietors of the library be held responsible as having published the libel? 40. Is a retail bookseller liable for libellous statements contained in a book or other publication exposed by him for sale?

41. A public library purchased a fifteenth-century MS. for £40 from a respectable professional man, who said that he had himself acquired it by purchase. After a lapse of about ten years—the seller being now dead—a claim was made upon the library by an Archaeological Society in a distant part of the country to deliver up the MS. to it as being its property. Satisfactory evidence was produced that it had been presented to the private library of the Society about thirty years before, and that it had been borrowed at one time from it by the seller, who was a member of the said Society, and no evidence of an independent title to it on his part was forthcoming. On the hypothesis that the Society made its claim for restoration of the MS. as soon as it discovered where it was, must the public library restore it? Would it be different if the Society had delayed to demand its restoration for two or three years after it discovered where it was?]



## VII

### AT AN AUCTION

1. AT an auction of books I intend to bid for various books for myself, and have at the same time undertaken commissions for a friend. Am I liable to him if I neglect to attend the auction on account, say, of an unexpected visit from some one, or of indisposition, or of another engagement?

2. I have travelled from *X* to *Z* solely on account of the auction; on my arrival I learn that the auction has been put off for a week; can I demand reimbursement of the expenses of my journey<sup>1</sup>?

3. A book for which I had given the highest bid is withdrawn from the sale on the ground of insufficient offer; can I not demand that it be knocked down to me? 4. By oversight I have made a bid for No. 117, believing that it was No. 116 that was being sold, and it has been knocked down to me; must I keep the work? 5. In the catalogue I find 'fourth edition' of Puchta's *Pandekten* wrongly entered for fifth edition; can I on the ground of failure of *dicta promissa* refuse to take the book for which I made the bid? 6. How in the reverse case, if the fourth edition was designated in the catalogue as the fifth<sup>2</sup>? 7. If no edition were named, can the bargain be gone back upon in respect of insufficient *dicta promissa*?

<sup>1</sup> For English law, see *Harris v. Nickerson* (1873), L. R. 8 Q. B. 286.

<sup>2</sup> For English law on this see *Pollock, Contract*, 576; *Torrance v. Bolton*, L. R. 8 Ch. 118; cf. *Caballero v. Henty*, L. R. 9 Ch. 447.

8. In performing the mandate given to me by my friend I have obtained a work by giving a bid for it. For the numbers following it in the catalogue, comprising worthless pamphlets, no bid was given, and in accordance with the practice prevailing in many places they were each knocked down to me at the lowest upset price (one penny). My friend refuses to take them over because he had given no mandate for them; must he take them?

9. What legal relation arises after a bid has been given, and before the thing has been knocked down—a sale under a suspensive or resolute condition dependent on the will of the other party, a *pactum de emendo*, a bare offer? 10. If the thing is destroyed at this stage, upon whom does the loss fall: the bidder or the party auctioning? 11. The auctioneer becomes informed that the persons present at the auction, being a small number, have made an arrangement among themselves not to raise the prices of the books by bidding against each other, but rather, after the auction is over, to put up again to auction among themselves the books which each of them had secured and divide the gain. The amount realized by them in this manner for the books comes to more than double what was got by the party auctioning. The latter thinks he can claim the excess by means of the *act. doli*; is his claim well founded<sup>1</sup>?

11 a. A 'Puffer' (*Scheinsteigerer*)<sup>2</sup> who was present solely to run up prices, has had knocked down to him a costly work at £15, and has paid the amount in cash out of a sum of £25 which had been handed to

<sup>1</sup> For English law on this see *Fuller v. Abrahams*, 6 Moore 316, 3 Brod. and Bing. 116; for Scotch law see Bell's Principles, § 132.

<sup>2</sup> Called a 'Whitebonnet' in Scotch law.

him beforehand for the purpose by the party auctioning. A person, who had made the immediately preceding bid, repurchases it from him for £16, which he pays at once in cash. The 'Puffer' having appropriated the £16 to himself, the question arises whether the party auctioning can revindicate the work from the holder; he thinks he is entitled to do so because the sale and delivery to the 'Puffer' and the payment thereupon made by the latter have been merely pretence transactions, and therefore the property did not pass to him and consequently not to the second purchaser.

12. In a book purchased at an auction a five pound note is found pasted between two pages; can the buyer keep it? Has he bought it with the book? Can he claim it as treasure-trove? It may be assumed as a fact that the owner of the library sold did not paste it in.

BY THE TRANSLATOR.

[13. A manuscript of Justinian's Institutes, said by the auctioneer to be of the twelfth century, is knocked down to *A* for £50. *B*, one of the bidders, afterwards gives him £10 extra for his bargain. It turns out to be of the fourteenth century and of comparatively little value. Has *B* any remedy?]

## VIII

### RELATING TO NEWSPAPERS

1. SEVERAL persons make an agreement to take in a newspaper jointly; what kind of legal transaction is this? One of them orders the paper at the Post Office and pays the subscription; by what action would he be able to recover from the others their proportionate shares? 2. What is the nature of the transaction with the Post? Does the latter undertake solely in a representative capacity the charge of ordering the paper at the publishing office, or does it contract independently<sup>1</sup>? 3. In the latter case how must the contract be regarded, as *locatio operarum* or *operis*, or as sale, and if as sale, how is the object of it to be described? 4. Is the Post bound to make subsequent delivery of any numbers wanting, and by what action must one make a claim for them? If the numbers are not subsequently delivered, how would the measure of damages have to be determined; would it be simply the sale price of the individual numbers? Suppose it were a case of a story appearing in the *Feuilleton*, or that of a newspaper which is being kept on file in a public library, with a view to its being a source of history in the future? Is the position of a public library

<sup>1</sup> This and the next five questions should be answered in accordance with the principles of general jurisprudence and Roman law, and apart from consideration of special regulations affecting the Post Office. See 12th ed., No. 2. In Germany, contrary to British practice, the Post Office often undertakes agency for supplying newspapers, &c., something like newspaper agencies with us.

and of ordinary subscribers the same in this matter? 5. Where a paper is suppressed during the period of a quarterly subscription, is the Post bound to make a proportional return of the amount of the subscription already paid? Or 6. Cannot the subscribers return the delivered copies and claim back the whole of their subscription, by showing that they had subscribed for a whole quarter and are not under any obligation to accept a part performance? 7. Could not by Roman law the Post or the publishing office, on the other hand, effectually maintain the position that, in sale the *periculum* being with the buyer, and the suppression of a paper having to be looked on as *casus*, the subscribers could have no claim for return of the price paid?

Possession and property in the separate numbers. 8. The newspaper is to be sent first to *A*, then to *B*, while *C*, who gets it last, is to keep it. The Post messenger is in the habit of delivering the separate copies of the newspaper by laying them down in the vestibule of *A*'s house. Is immediate possession and property in them thereupon acquired, and by whom? by *A* alone, or have *B* and *C* also at the same moment, or *C* alone, acquired the possession and property? Is it a point of importance who gave the order for the paper? 9. How is the property of the separate numbers to be determined, if it has not been agreed that one of the parties shall keep them? 10. A newspaper can be the cause of great damage by giving false news—it can, in particular, influence very sensibly Stock Exchange securities (e.g. by giving false exchange reports at large centres, by untrue accounts of important political events); does this give rise to any liability, and against whom must proceedings be taken,

against the editor or the proprietor of the paper? Is it a question of *dolus*, or as there is an obligatory relationship between the subscribers and the conductors of the paper, is *culpa* sufficient? 11. A member of a club, who was the last to leave the premises in the evenings, was in the habit of taking home with him newspapers that he had not yet read, and bringing them back in the morning; what action could the Committee bring against him by Roman law if, despite repeated prohibitions, he would not give up the practice? 12. In the rules of the club there was a provision: 'Whoever makes use of the establishment, without being a member, must pay the yearly subscription of thirty shillings.' A non-member has bribed the club servant to let him have the newspapers after they have been read; has he to pay the subscription? How is his contract with the club servant to be described? Would the latter be able to bring an action for the reward promised to him?

13. May a newspaper about to be brought out take the same name as one already in existence, whether at the same or at a different locality? 14. Where the publisher of a newspaper has sold it, may he afterwards start a new one (under the same or a different name, and at the same or a different place)? 15. May one newspaper print the telegraphic news of another? single articles? whole sheets? 16. How should we describe the position in law of the security which in many countries has to be given before a newspaper can be started? Would it make a difference whether such securities have to be in cash or in negotiable instruments, i. e. what right does the State acquire in it (property, pledge)?

17. Specimen numbers of a newspaper that has just

come out are sent to many people in the locality, on which are printed in large type—‘Gentlemen accepting two of the specimen numbers sent to them will be regarded as subscribers.’ An advertisement Gazette contains this notice—‘Those of our honoured subscribers who do not countermand the paper four weeks before Christmas, we will regard as subscribers for the new year.’ Have these respective notices legal effect? 18. A former subscriber to a local newspaper, who has not renewed his subscription to it, still has it delivered to him, notwithstanding his servants have let the newsboy know that it is not wanted any more. At the end of the quarter he is asked for payment of the subscription, and, upon his refusal, for return of the various copies delivered. He has thrown them into the waste-paper basket; was he entitled to do so? 19. A newspaper of distinctly outspoken political views prints advertisements that have appeared in papers attached to the opposite political party. Can the advertisers prevent this? It is maintained against them that, so far from having suffered thereby, they on the contrary gain a positive advantage, through the printing of their advertisements without charge, and that moreover in public notices, unlike productions of intellectual effort, there is no copyright: once published in the press they can be reprinted by any newspaper. The advertisers reply to this that they have the keenest interest not to let the public suppose, as might result from insertion of their advertisements in the sheet in question, that they belonged to its political party, and that the case is just the same as if their name, without their knowledge or will, had been appended to a political manifesto.

20. Not unfrequently seriously intended advertise-

ments in a paper are reprinted by other papers under the heading 'comical advertisements' (which description they may in fact deserve) at full length, i.e. with the name of the place and the advertiser; must the advertiser submit to this? How would it be if the advertisement was reprinted without the said description but solely with the remark—'In the Gazette of the town of X there appears the following advertisement'?

21. How is the position of newsboys who hawk about single copies of newspapers for sale upon railways to be described legally? They are given to them by a general newsvendor on the terms that they are to be sold at a fixed price of which the newsboys are to get a share, those not sold being handed back. Is this to be described as so-called truck (*contractus aestimatorius*)? 22. American papers reported the following case: A New York lady, Mrs. Harcott, brought an action against the publisher of the *New York Herald*, because he had described her a year before in his paper as 'a rich and benevolent lady.' In consequence of his having done so, Mrs. Harcott had subsequently received 6,000 letters, had had 14,000 persons calling at her house, and the requests for money made upon her amounted in total to thirty million dollars. In her statement of claim Mrs. Harcott said, 'It only remains that some robbers should be found to fall upon me in the night, in order to make off with the property which the editor has falsely attributed to me.' What is to be said of the action?



## IX

### HOUSE-BUILDING

1. Does property in a house depend on the property in the ground and soil? 2. Can one not put up a house on a building site that one has hired? What legal relation arises in this case? 3. Wherein is the erection of a market booth distinguishable from this last-mentioned legal relation? 3 a<sup>1</sup>. What legal relation arises if the usufructuary of a land estate erects a barn on it? 4. Is scaffolding put up for the building of a house acquired by the owner of the ground? 5. Is it necessary for the owner of the soil to make sure that he has the property in the building material to be employed? How, if he obtained it in good faith from a person not the owner of it? Does he become by *specification* owner of the same, or can the real owner vindicate it from him? 6. By Roman law can the absence of ownership in the building material be afterwards made good by prescription? 7. How does it stand in this respect with the rain-barrels attached to the house? with the wine-casks in the cellar? with the double window-frames which are put on merely during the winter? 8. Can the owner in selling the house retain these as forming no part of it? Would it be of importance whether he sold the house in the winter when the double windows were in, or in the summer when this was not the case?

9. What kind of legal relation presents itself when

<sup>1</sup> From 12th ed., No. 4.

the architect, who has designed the plan, has undertaken to erect the whole building for a specified sum? 10. Who has to bear the loss if the house collapses before its completion in consequence of an earthquake? Has the architect a claim for a proportional payment for the work done<sup>1</sup>? Must he without an increase on the sum agreed on begin the building anew<sup>1</sup>? 11. The building-contractor has expressly declared to the proprietor, who would not let him go beyond £1,000, that he is unable for this sum to put up the house in the way proposed by him, or rather that this would be possible only on the understanding that a saving in material in such or such respect be made, but that the solidity of the building would be thereby imperilled. Should he not as a professional builder have declined altogether to undertake such a building, which he himself declares to be insecure, and is he not liable on this ground, or can he—assuming that he has executed the building according to the agreement—repudiate all responsibility? 12. For what degree of *culpa* is an architect responsible who has undertaken to direct and inspect the building operations? Perhaps only for *culpa lata* like a *ensor*<sup>2</sup>? 12 *a*<sup>3</sup>. Is he liable for the consequences of negligence on the part of a building inspector appointed by him? particularly, is he liable if, in consequence of such negligence, the scaffolding falls down and workmen are thereby injured or killed? 13. If, as is quite a common occurrence with architects, he has made a material mistake in his estimate, can the proprietor

<sup>1</sup> From 12th ed., No. 11.

<sup>2</sup> According to I. 1 § 1 *si mensor falsum modum dixerit* (D. 11. 6). But see Windscheid, *Pandekten*, II, § 404, n. 4.

<sup>3</sup> From 12th ed., No. 14.

who, if he had known the actual cost beforehand, would probably not have gone on with the building at all, hold him responsible on this ground or make a deduction from his fee? 14. A person consults an architect and puts the question whether he can erect a house on his site for £4,000, telling him what he wants done as regards its general arrangements. The architect thereupon prepares a plan, which however does not give satisfaction; can he claim a fee for it? Cases of a similar kind often occur, e. g. a public advertisement for the erection of buildings for social entertainments with an invitation to send in plans and estimates. The following case recently came before the Courts: A wine merchant, desirous of having elegant labels for several sorts of his choicer wines, applied to a lithographer, requesting him to send in specimens. The latter prepared them, but they did not please; can the lithographer demand compensation for his labour expended to no purpose? 15. Must a houseowner submit to telegraph and telephone wires being carried through the air above his house? Can he not prevent it in respect of his right of property extending to the sky above his ground? Does a landowner require to submit to a viaduct being carried across his ground? Are the two cases on all fours? 16. Does property also extend into the bowels of the earth? Has the landowner a right to object to the placing of a tunnel or cellar at a depth of some thousand feet below the surface of his ground? How is the notion of unlimited extension of property above and below the surface thereby affected?

17. The following case is taken from a German newspaper: 'For some years an American has been in possession of that part of the island of Capri,

beneath which lies the famous "Blue Grotto"<sup>1</sup>, and he asserts that as he is owner of the land and soil there, all that is beneath them, viz. the "Blue Grotto," also belongs to him. This grotto is in possession of the town of Capri, whose Municipal Council receives an entrance fee from all persons visiting the grotto and has no intention of voluntarily surrendering its property to the Yankee. The latter has accordingly raised an action. If he loses it he can still do an evil turn to the grotto by boring a hole from above through the vaulting, whereby the present beautiful reflexion of light in the interior would immediately disappear.' Two similar cases have recently arisen in Wurtemberg at the Kyffhäuser<sup>2</sup>. How should they be decided? 18. A Telephone Company has concluded a contract with several houseowners, that for a single lump sum paid down it will put the mechanism required for the telephone into their houses; how is the relationship thence arising to be defined in law—merely as one of contract, or as a *ius in re*, perhaps as *servitus praedii urbani*? 18 a. A new bathing establishment about to be erected has had conceded to it by the Town Council the right of drawing water without payment from the town's main water-pipe. Are we prevented from holding that there is here a praedial servitude, by the circumstance that the water is a *res publica*, over which, as we know, servitudes are not possible?

18 b<sup>3</sup>. A Town Council transfers to a Gas Company the right of supplying dwelling-houses with gas and allows it to put the pipes necessary for the purpose

<sup>1</sup> The *Grotta azzurra*.

<sup>2</sup> Where Frederick Barbarossa is supposed to be sleeping.

<sup>3</sup> From 12th ed., No. 20.

under the public streets. What kind of legal relation arises here? Whose property are the pipes?

19. By Roman law can a person erect a house as close as he pleases to his boundary line? 20. May he put up the scaffolding on his neighbour's ground? 21. Is the owner of the building liable if scaffolding, erected by him on his own ground, collapses and falls on the neighbour's ground? Can the latter take precautions against this eventuality? 22. Is a scaffolding an appurtenant to the house? 23. Has any one possession of building materials, which are lying in the open unprotected during the building of the house, or are they unpossessed, for the reason that they are not *sub custodia*? 24. At what moment does the possession and property in the bricks, which the maker has to deliver at the building site, pass to the buyer—at the moment when the former has unloaded them, or when the latter has been notified of this, or when he first sets eyes on them? 25. Is the contractor, who has delivered bad material, e.g. defective beams, in consequence of which the house collapses, liable for the whole damage, or has he only to return the price he received, or is he, seeing that the buyer has approved of the material by accepting it, liable for nothing? 25 a<sup>1</sup>. Iron girders ordered turn out unfit for use. The builder indicates his intention of returning them. The contractor for them offers to send in their place other serviceable girders. Must the builder accede to this?

26. If in building I overstep the limits of my right, can my neighbour delay enforcing his right till the whole building is completed, and then demand that the building be altered as required at my expense,

<sup>1</sup> From 12th ed., No. 28.

e.g. that the wall be carried back about five feet? He founds upon the terms of the *intentio* of the Roman *act. negatoria* and *confessoria* (*ius tibi non esse—ius mihi esse*), the 'ius' must have specific effect given to it. 27. What has he to do, when I am in course of building? 28. Have I, as soon as he makes a protest, to stop building till the matter is determined? 29. How can one wishing to build and to guard himself beforehand against such unseasonable disturbances effect this object? 30. A man gets permission from his neighbour to erect a scaffolding on the latter's ground during the building; is a praedial servitude thereby constituted? 31. They both agree that they will mutually permit this in all cases of building or repairing; are their singular successors bound by this agreement according to Roman law, or can they at their pleasure recall it? 32. A wine-merchant acquires by purchase from his neighbour the right to enlarge his cellar by going underneath the latter's garden at a certain depth; has he the property in such cellar or only a servitude? Would it not be an objection to the latter view, that one cannot say of this servitude '*fundo utilis est*'? Such wine-cellar is not beneficial for each possessor as such, but only for a wine-merchant; it seems therefore not at all possible for it to be a praedial servitude according to l. 6 *pr. de S. P. R.* (D. 8. 3)<sup>1</sup>. 33. A certain person has an ale-cellar cut out in a cliff belonging to the town; how is his position to be described in a legal view; as property, praedial servitude, mere right of obligation, or is there by Roman law any other legal form conceivable? 34. A miller permits a teacher of

<sup>1</sup> '*Sed si, ut vasa venirent, figlinae exerceantur, ususfructus erit.*

swimming to set up on his ground behind his mill a bathing establishment on payment of £5 a year for thirty years. In whom is the property of it vested? Has the teacher of swimming to depend exclusively upon an action based on the contract for his legal protection? 35. Which of the two gets the wood-work on the expiry of the thirty years?

## X

### AMONG NEIGHBOURS

1. FROM an upper story of my neighbour's house a servant-maid has repeatedly emptied the table-cloth after dinner into my garden, and also thrown withered flowers into it; I have frequently complained of it to her employer, but without success; on the last occasion the employer replied to me that he had forbidden the maid to do it, and if she will not obey his directions, he can do nothing more. Can I sue the employer? Perhaps by Roman law by the *act. de effusis et deiectis*? Or by the *act. negatoria*? Or, according to l. 8 § 5 *si serv. vind.* (D. 8. 5) *in fine*<sup>1</sup>, by the *interd. uti possidetis*? Is there not still another action by Roman law?

2. Fruit of mine falls from overhanging branches into my neighbour's garden; must he by Roman law allow me to gather it<sup>2</sup>? 3. Can I for this purpose step on his flower-beds? 4. By what means can my neighbour secure himself against such inconveniences? 5. Does he, from the fact that the fruit is lying on his ground, become its possessor? 6. Is the fruit, till I on my part gather it, without an owner? 7. Must the neighbour submit to my branches overhanging<sup>3</sup>? 8. Has he also to submit to the gutters on my roof

<sup>1</sup> 'Et interdictum uti possidetis poterit locum habere, si quis prohibeatur, qualiter velit, suo uti.'

<sup>2</sup> See l. 1 *pr. De gland. leg.* (D. 43. 28).

<sup>3</sup> See l. 1 § 7 *De arb. caed.* (D. 43. 27). For English law see *Lemmon v. Webb* (1895), A. C. 1.



being inclined so far outwards that the water from them falls into his garden? 9. My neighbour has appropriated a meteoric stone that fell on my ground; can I vindicate it? Was his act a *furtum*? He has sold it to the Natural History Museum for £10; can I claim this sum?

10. The post, on which my dovecot is fixed, has become rotten and leans over towards my neighbour's ground; he has called my attention to it and requested me to replace the old post by a new one; I for my part have replied that, so long as my dovecot does not lean over so as to come within the space above his property he is not concerned; is this true?

11. My pigeons have failed for some time to return to their cot; my hens, ducks, geese, and cattle have strayed away; is possession and property in them lost? 12. I suspect that my pigeons have flown with those of my neighbour into his dovecot; is he bound, in accordance with the principles of the *act. ad exhibendum*, to let me see into his dovecot? 13. By what action can I, if my suspicions are well-founded, demand back the pigeons? 14. Is a *rei vindicatio* required, and, if this is the case, will it be sufficient proof of my property that the pigeons have been bred in my dovecot? 15. Can the neighbour plead, in view of l. 5 § 5 *de A. R. D.* (D. 41. 1)<sup>1</sup>, that the property has passed to him? 16. Will not a possessory interdict also be available? The *condictio furtiva*, the *act. ad exhibendum*?

<sup>1</sup> 'In his autem animalibus, quae consuetudine abire et redire solent, talis regula comprobata est, ut eo usque nostra esse intelligantur, donec revertendi animum habeant, quod si desierint revertendi animum habere, desinant nostra esse et fiant occupantium. Intelleguntur autem desisse revertendi animum habere tunc, cum revertendi consuetudinem deseruerint.'

17. My neighbour's bees cause me much discomfort, as his apiary closely abuts on my arbour. Can I insist upon his removing the beehives to a distance, or raising the wall between his and my garden, or putting up a screen so as to compel the bees to fly higher in the air? 18. May we not, if necessary, protect ourselves against the bees by smoke, gunpowder, poison, and the like? 19. Can the owner, in following a hive which has begun to swarm, go upon another man's ground? Assuming that he cannot, what action has the owner of the ground in respect of the unauthorized entry upon his property? The *act. negatoria*, the *interdictum uti possidetis*? 20. If the latter secures the hive, can the other party vindicate it, and how does he prove his property? The swarm is composed of single bees, and he cannot possibly prove ownership in each of them.

21. Can my neighbour, on my protesting against his apiary, rely upon the fact that it has been in the same place for ten years? By Roman law does the ten years' possession convert every possible condition of his land, through which I feel my rights of property prejudiced, into legal rights, i. e. into servitudes? 22. A drain on my neighbour's land has been stopped up for more than ten years, and in consequence thereof by moderately heavy rain the water in it overflows and runs upon my land. Has he thereby acquired the appropriate servitude by prescription? 23. My hens, ducks, and geese have hitherto searched for their food in his farm-yard. His successor excludes me from this privilege by closing his yard and pond; have I a quasi-possessory or petitory remedy against him? 24. Is the case different by Roman law if I, during the same period, have driven my cows to my

neighbour's meadow and my horses to his horsepond? What may be deduced from this for the doctrine of servitudes?

25. My neighbour's cat, which has often caused me annoyance, has got itself imprisoned in the coal bunker in my cellar, owing to the door, which was open, having been dashed to by the wind. I deliberately leave it there to die of hunger. In an action by the neighbour, can I plead effectually that I did not shut it in, that it had imprisoned itself, and that I was under no obligation to open doors to other people's cats? 26. A certain person killed his neighbour's cat, which was prowling after the singing birds and poultry in his garden. Was he justified in doing so? The same question arises with regard to strange dogs, which have made a hole in my hedge and are destroying my flower-beds<sup>1</sup>.

26 a<sup>2</sup>. A person keeps a watchdog in his courtyard, which by its continual howling during the night disturbs the sleep of the neighbours. Have these a claim to have the dog put away? or for damages? Are such claims, if any, available only to the owners of the neighbouring properties, or also to the tenants? 26 b. How are these questions to be answered in the following cases?—A person allows his garden to run wild, so that weeds shoot up in luxuriance. The seeds from these weeds are carried by the wind into his neighbours' gardens. 26 c. A person erects on his ground a petroleum-refinery, through which the

<sup>1</sup> For English law on this see Pollock on *Torts*, p. 167; *Miles v. Hutchings* (1903), 2 K. B. 714; and the American case *Aldrich v. Wright* (1873), 16 Am. Rep. 339.

<sup>2</sup> This and the following two cases are from the 12th ed., Nos. 21-23.

danger of fire to the neighbouring properties is materially increased. As a consequence the owners of these latter are charged higher premiums for fire insurance, while the value of their properties falls.

27. My neighbour, whose garden immediately abuts on the gable walls of my house, which are without side windows, fixes espaliers to them on which to train vines. May he do so? He asserts that the prohibition on my part is based on sheer malignity, which as every one knows is not to be submitted to in relations between neighbours. 28. In the case of my neighbour having windows in his side wall, may I, by erecting a high wall, shut out his view into my garden? 29. A newly-hired farm-servant, whom his master has ordered to unload some cartloads of dung and dig it into a field of his (which the servant assures him he knows quite well), by mistake does this on another's field; can the latter be sued for compensation for the value of the dung?

30. The following case occurred in a small town: An innkeeper there had sought to purchase a small piece of neighbouring ground, close to his dining-room, on which there was a midden, but was prevented from doing so by the extravagant price demanded for it by the owner. In order to force him to consent to pay the price asked, the owner made his farm-servant every day, about dinner-time, when the guests were assembled in the room, stir up the midden by a long pole, with the result that the guests left. The innkeeper brings an action to have this stopped, in which the defendant pleads—that the midden is legally his and he can use it as he pleases. How should the case be decided and what is the proper action for the

complainant to bring<sup>1</sup>? The *act. doli, iniuriarum, negatoria, operis novi nuntiatio*? Can he claim damages on the ground of his customers having given up dining at his table, in consequence of the said machination of the defendant?

BY THE TRANSLATOR.

[31. At Christmas a box of wine is delivered at my house which I, believing it to be a present from my wine-merchant, put into my cellar. It was in fact intended for one of my neighbours and was delivered at my house by mistake. After a lapse of three years can I, by Roman law, assert ownership in the wine by prescription?

32. A person converted part of his private domain into an ornamental lake. Owing to the action of a severe frost and heavy rains during one winter the embankment surrounding it burst and the water of the lake escaping flooded his neighbour's ground. Is the owner of the lake liable for the damage<sup>2</sup>?

<sup>1</sup> For English law see *Aldred's ca.* 9 Co. Rep. 59 a; *St. Helen's Smelting Co. v. Tipping* (1865), 1 Ch. 66, and 11 H. L. C. 642.

<sup>2</sup> For English law see *Rylands v. Fletcher*, L. R. 3 H. L. 330, and *Nichols v. Marsland* (1876), 2 Ex. D. 1.

## XI

### IN THE STREET

1. A PERSON going along a street has been wetted by water thrown out of a house. If he has recognized the person who did it, can he sue him simply for reparation of the damage caused—damage to his hat and clothes—or has he a still further claim? 2. Does it in either view make any difference whether the delinquent knew the passer-by or not, whether he wished to drench another and by inadvertence has drenched him, or has mistaken the one for the other, or has not noticed at all that any one was passing by? 3. Can the landlord of the house be sued, and by what action? Is he also liable if tiles from his roof, or flower-plants from his window or his balcony, &c., have fallen on a passer-by? During a storm the whole parapet of a balcony fell on the street and seriously injured a horse; the owner of the house refused to pay damages on the ground that any such claim was subject to the condition of *cautio damni infecti* having been previously applied for<sup>1</sup>. Is he also liable if the fall had been occasioned by an earthquake, or if owing to a hurricane a gable roof, quite solidly erected in ordinary respects, had been thrown down? 4. Is the parish (*Gemeinde*) liable if the top of a tower already known to be unsafe falls upon adjoining houses during a hurricane? Also when this happens through an earthquake or by a flash of lightning?

<sup>1</sup> See II. 6 et 7 *de damno infecto* (D. 39. 2).

5. My dog is attacked by another and worried to death; is the owner of the latter liable<sup>1</sup>? 6. Is he also liable if his dog has snatched a piece of meat hung up outside the shambles or a butcher's shop? 7. In such cases can one seize the dog and retain it till damages are paid? 8. Can dealers in pottery also, whose wares exposed in the market-place have been smashed by dogs starting to fight, claim damages? 8a<sup>2</sup>. Two dogs have attacked a flock of sheep and bitten several of them to death. Are the owners of the two dogs liable *in solidum* for the damage caused or each of them only for such sheep as his dog is directly proved to have killed? 8b<sup>3</sup>. A big dog which without any cause was attacked by a little yelping terrier bit the latter to death. Is the owner of the big dog liable, or can he not plead effectually that the terrier has met its fate through its own fault<sup>4</sup>?

9. Is the coachman, whose horses have shied, liable for damage caused by his vehicle? 10. Has he to pay to the full amount for costly plate-glass windows of a shop, that have in consequence thereof been shattered, or can he not escape this claim by founding on l. 13 § 1 *de S. P. U.* (D. 8. 2)<sup>5</sup> and l. 40 *pr. de damn. inf.* (D. 39. 2)<sup>6</sup>? 11. What is the appropriate action

<sup>1</sup> For English law, which requires knowledge of viciousness on the part of the owner, see *Worth v. Gilling* (1866), L. R. 2 C. P. 1.

<sup>2</sup> From 12th ed., No. 5.

<sup>3</sup> From 12th ed., No. 7.

<sup>4</sup> Cf. l. 1 § 11 *si quad. paup.* (D. 9. 1), as to animals fighting.

<sup>5</sup> 'Parietem communem incrustare licet secundum Capitonis sententiam, sicut licet mihi pretiosissimas picturas habere in pariete communi; ceterum si demolitus sit vicinus et ex stipulatu actione damni infecti agatur, non pluris quam vulgaria tectoria aestimari debent.'

<sup>6</sup> 'Ex damni infecti stipulatione non oportet infinitam vel immoderatam aestimationem fieri, utputa ob tectoria et ob picturas.'

here? To this question the author once got this answer at one of his lectures:—the *actio negatoria*, because the action relates to a ‘partial encroachment upon property.’ 11 *a*<sup>1</sup>. Is the owner of a carriage liable for damage occasioned by it? 11 *b*. Particularly, if the coachman is going at an imprudent speed and thereby runs over, say, a person hard of hearing, who is crossing the street without paying attention? 11 *c*. A person has at the risk of his life pulled up horses that have run off with a coach and has been thereby severely injured. Has he a claim against the occupants of the coach thus rescued by him for the costs of his cure? 12. It has often occurred in recent years that wild animals have escaped from a travelling menagerie; has every one the right to shoot them dead, even when he himself is not threatened by them (e.g. when he is at a window and sees them in the street), or has the owner in such case, by Roman law, the *act. leg. Aquiliae*? Would l. 2 § 2 *ad l. Aq.* (D. 9. 2)<sup>2</sup> stand in the way of an action? 13. A tiger, after having killed a horse, was overpowered by *A, B, C*; can the owner of the horse demand the *noxae datio* from *A, B, C*, or damages for the injury from the possessor of the menagerie? Can the latter revindicate the tiger?

14. By the fall of a tile from a roof a passer-by was so severely injured that it was thought to be necessary to get him into the nearest house and to summon a doctor with all speed. To whom must the doctor look for his fee, to the person who summoned him or to the injured man? 15. May we not take the view

<sup>1</sup> This and the next two questions are from 12th ed., Nos. 8–11.

<sup>2</sup> ‘Longe magis bestiae in eo numero [sc. pecudum] non sunt, veluti ursi, leones, pantherae.’



that the doctor has given his services out of pure humanity, and so has no claim for a fee? 16. Can the injured man not plead against him, that he for his part did not summon him and that he must go against the person who did so? Must tacit consent on the patient's part to the medical aid be made out as a preliminary to his liability? 17. Assuming the doctor was not a recognized practitioner but a senior medical student still attending the University, can he also demand a fee<sup>1</sup>?

18. In many large towns public passages run through private houses and courtyards (e. g. in Vienna at the so-called *Durchhäuser*, in Leipzig, and elsewhere); how are we to regard these according to Roman law, and what remedy would arise as a consequence of the owners shutting up such thoroughfares? 19. Besides the remedy referred to, would not also another remedy be competent, in the case where an owner prohibited a personal adversary from going through his yard and threatened him with violence if he did so?

20. In giving alms to a beggar, I make a mistake as to my money, and instead of silver or copper give him a gold coin; has property passed, and what would be the proper action? 21. The beggar has simulated a physical defect, e. g. want of an arm or leg; how are we in a legal view to characterize this conduct, and may I on this ground demand back my gift? 22. On my addressing him he has pretended to be another person than he is; is there here merely an error in motive? 23. Or his poverty was only a pretence, he was a man of means playing the beggar; are the alms recoverable on this ground—perhaps by the *condictio ob causam datorum* in respect of failure of conditions

<sup>1</sup> Cf. the English Medical Acts, 1858 and 1886, § 6.

or by the *condictio sine causa* in respect of undue enrichment? How if the beggar *bona fide* believed himself to be poor, whilst he without knowing it had become rich through an inheritance having fallen to him<sup>1</sup>?

24. I ask my way from some one on the road. A wrong direction on his part can cause me great inconvenience; is he liable if he have unwittingly but negligently, or if he have wilfully, told me wrong<sup>2</sup>?

25. I ask a person for the shop of a substantial tradesman, who has been recommended to me, and he deliberately directs me to the shop of another of a similar name, who is a notorious cheat, and who takes gross advantage of me in my purchases. Have I a claim for damages against such person? Does the business done with the second tradesman hold good in law? Has a tradesman, against whom he warns me, an action against him for describing his thoroughly sound business as an unsound one? Or even when it really deserved this name? Or even when he merely advised me to make my purchases elsewhere?

26. Many householders suffer from nuisance committed at their house corners; is there any remedy at common law for this? By Roman law perhaps the *act. negatoria*, the *legis Aquiliae*, the *interdictum quod vi aut clam*? 27. Can the owner of the house not protect himself by a notice put up publicly at the place liable to the risk, threatening the wrongdoer with a penalty of moderate amount? Obligatory force for this threatening notice may be made out in the following way—he who reads it and nevertheless commits the act forbidden, tacitly consents to the

<sup>1</sup> From 12th ed., No. 22.

<sup>2</sup> Cf. I, No. 17 *supra*.

penalty, it bears the character of a conventional penalty in itself. 28. Enraged at his inability to stop the nuisance, he poured a basin of slops on the head of one whom he caught in the very act. This person brings an action against him; can he plead in defence that he is entitled to protect his property by any act he pleases? 29. Will it influence the judgment in the case, that he has previously warned the person concerned, and that he has only carried out his threat after the warning had no effect? 30. In many towns in Germany the exterior entrance to large cellars is by means of a door opening on to the street. This is attended with danger to the public walking on the foot-pavement in the dark, if certain precautions, that are both possible and usual, are neglected. In case of a bodily injury being caused, what kind of action would be relevant here? What would be the measure of damages? Merely the medical expenses? Or also the loss resulting from neglect of business as well as *solatium* for the suffering? 31. Is the position different where a person, when calling upon an acquaintance, has in the dark tumbled down a cellar inside the house, the door of which had been negligently left open? A well-known jurist, now dead, once communicated to the author a case where a policeman, who had to serve a summons, suffered injury in this way, and it appeared to him very doubtful whether an action on the head of *damnum iniuria datum* would lie in the circumstances. What arguments are there for and against this view? 32. The counsel for the injured party thought that he might, if driven to it, found upon an analogous case in l. 7 § 8 *quod vi* (D. 43. 24), viz. *si fossam feceris in silva publica et bos meus in eam inciderit, agere possum hoc inter-*

*dicto* ; do the conditions in the above case admit of an analogous application of the interdict (*bos* = policeman, *silva publica* = cellar) ?

32 a. In beginning to open underground sewers in the town of X, a part of the street is broken up—a barricade of boards and, when dark, a lighted lantern, being placed as a protection. A drunken peasant returning home upset the barricade and lantern, with the result that a carriage and pair coming along soon after drove into the open pit and one of the horses was seriously injured. The owner claimed damages from the town, and was referred by its representative to the contractor for the drains, while the latter maintained that he was in no way responsible, as he had taken all the usual precautions, and that the only person responsible was the peasant. Against whom should the claim for damages be directed ?

33. I have had my outside window-shutters, front door, signboard, balustrades, paling, &c., painted, and have given the customary notice to the public to take care. Am I liable if a passer-by rubs against the freshly painted objects and thereby suffers damage ? How, if I have omitted the usual precautions ? Can I reply to the party injured : I have a right to have my things painted, and it is his own fault if he have rubbed against them ?

34. A person found a cigar-case in the street and gave it away to another who asked for it. Can he do this ? Was he not, after he had once picked it up, bound to keep it for the loser, as having undertaken a *negotiorum gestio* for him ? 35. Assuming that he has kept it, was he bound to notify it to the police or put an advertisement about it into the public prints ?

How can he, if he omits this, make himself secure against the presumption of having intended to appropriate it (theft of things found)? 36. May one again throw away a thing one has once picked up, for the reason that one does not wish to trouble oneself further about it? 37. Does one become owner of a thing presumably lost, if in fact it was not lost but thrown away? There is wanting here the will directed to acquisition of property, and even usucapion would be excluded on the ground of *malafides*.

## XII

### IN NEED OF MONEY

A MONEY embarrassment is for a student of law a very instructive opportunity to make himself acquainted practically with certain legal ideas and legal principles. 1. The first person to whom he betakes himself for help in need is some good-natured friend, but an inconvenient peculiarity of such a one is that he frequently has himself no money; if he has some, however, and gives it, the question may arise by Roman law, must the loan be repaid if the borrower can, as an unemancipated son, found on the *SC. Macedonianum*, while the lender as a minor can claim *restitutio in integrum*? 2. Would a defence based on the *SC. Macedonianum* hold good, if at the moment that I, the borrower, received the money, my father's death had occurred without my having received news of it? To the plea that I had already become *paterfamilias*, can I not reply that I had not the intention to bind myself as *paterfamilias* but as *filiusfamilias*, i.e. not with, but without, legal effect; that accordingly there is here wanting the *animus obligandi*, which is an essential condition of an *obligatio*? 3. If my friend has no money, the pawnshop is open to me. Winter overcoats can, without inconvenience, lie at the pawnbroker's during the summer months, summer garments during the winter. Is the pawn-office liable if my coats are stolen from it, or if

the moths get into my fur overcoat? 4. Is the legal relation that arises from pawning quite the same as the Roman *pignus*? Is the debtor bound personally when he pawns, so that if the sale of the article does not cover the debt, or if it is destroyed by accident, he can be sued for payment of the debt<sup>1</sup>? Or if this is not the case, is there not here perhaps awaiting the necessary right of action for the pledge, and therefore the legal relationship in general is perhaps not to be determined according to the rules of the Roman law of pledge. 5. If I, not being in a position, or not being of the mind to redeem the pledge, make over the pawn-ticket to another person—which seeing it bears to be to the holder gives the right of redemption to any one who presents it—is this an assignment (*cessio*)? Is there a donation in this case? The object of the gift was wholly without value for myself, and as the person redeeming the coat must pay for it, how can there be a gift of it? 5a<sup>2</sup>. At what moment does the property in the coat pass to this other person? 6. What legal relation arises if I again pledge the pawn-ticket—a *pignus nominis* or a *subpignus*? 7. When I in winter go to redeem my topcoat I discover that the pawnbroker's assistant, not having one of his own, has made use of mine. How is this act to be characterized by Roman law? Must I take back my coat or must the pawnbroker make good the value of it? 8. Is he under any obligation to me, if I have lost the pawn-ticket, and the finder redeems the coat?

<sup>1</sup> For English law on this point see *Jones v. Marshall* (1889), 24 Q. B. D. 269.

<sup>2</sup> From 12th ed., No. 4.

9. The last resort in need is the money-lender. I know, however, that I must pay dear for his services. Nominally he takes only 5 per cent. interest, but he has his further profit in taking a receipt from me for £5 while he gives me only £4. What effect has this manipulation? Is the money-lender bound to pay to me afterwards the £1 awanting? Can I, in repaying him the capital, make a deduction of the £1 not received? 10. How do matters stand as regards the proof of my assertion that I have received twenty shillings too little? Has the document given by me acknowledging receipt of £5 the force of proof by Roman law? 11<sup>1</sup>. Was the rule applied to a document of loan the same as that applicable to *depositum irregulare* by Roman law? If not, what means of avoiding the provisions regarding the evidentiary force of a document of loan were in Rome left open to the money-lender? 12. My creditor has admitted into the document a clause of obligation 'upon word of honour'; has this clause any legal significance? 13. On his request I have supplied him with two friends as sureties; can he straightway sue them on the day the debt is exigible? Each for the whole or only for his share? Can they set up the plea that there had been extortion or fraud used towards me? 14. If they have paid, by what action can they have recourse against me? 15. *C* is asked by *B* to become surety for him for a loan of £100 from *A*, in fact, however, a loan of £300 has been made to *B*, and *C* becomes surety to *A*, without thinking of the amount of it; is he liable for £100 or £300? Is it a relevant matter whether *A* was in

<sup>1</sup> Part of this question omitted as relating to a point of German procedure.



*bona fide* or was acting collusively with *B*? 16. Is error of the surety as to the identity of the person who is lending the money material? And is error as to the identity of the debtor? Of two sons of a deceased friend the surety has confused the one, about whom alone he has any information, and that most favourable, with the other, who is a thoroughly frivolous fellow and insolvent, of whose existence he has hitherto had no news at all, and becomes cautioner for the latter; must he pay? 16 *a*<sup>1</sup>. No date has been fixed for the repayment of the loan. Can the creditor demand repayment of it forthwith? Does the rule applicable to the receiver of a loan apply also to a banker with whom one has deposited money? 16 *b*<sup>2</sup>. A person has entered into a written obligation, by which he declares that he guarantees a loan to be granted to *X* of £5, without naming any creditor. Will such person be bound by it, if *X* on the strength of the document actually obtains a loan? Is this construction possible, seeing that suretyship presupposes a contract to exist?

17. As my father is still living and the money-lender is afraid that I might on this ground dispute the loan as not binding, he has proposed to me to buy some article or other from him for £7 10s., undertaking to buy it back for £5 in cash; how is this transaction to be regarded in law? 18. How then, if he does not himself buy back the article from me but leaves me to turn it into coin elsewhere and thereby provide myself with money? Is the loan valid to the amount of the account, £7 10s., or the real value of £5? How is the matter to be judged of, if an agree-

<sup>1</sup> From 12th ed., No. 16.

<sup>2</sup> From 12th ed., No. 17.

ment were made that whatever I should get by sale of the article should be esteemed the amount of the loan? When does the loan in such case take place, at the moment of the sale, or at the moment of delivery of the article with retroactive force? How, if the thing perished before the sale by accident; who bears the risk? 19. Being in monetary difficulties I sell my things at a price that is a mere mockery to a person who is aware of my position; is the contract challengeable? Perhaps on the head of *dolus*? or *laesio enormis*? For this question are l. 24 § 4 *de minor.* (D. 4. 4), l. 22 § 1 *sol. matr.* (D. 24. 3), and l. 12 § 11 *mand.* (D. 17. 1) applicable?

20. Does my minority in the above cases protect me, apart from the consideration whether I am under my father's power or under guardianship or not? 21. Can the sureties claim the benefit of *restitutio in integrum* which is competent to the minor?

22. Fortunately a student at one of the small German universities does not need to pay for everything in cash; landlords, innkeepers, tradesmen and others are so humane as to give him credit. The over-abundance of their humanity in this respect was at many universities sought to be counteracted by 'credit edicts,' which granted them an action only up to a certain amount, their claim for the excess being declared to be not enforceable; if their debtor did pay the balance, was the payment valid by Roman law? 23. Could he, so long as he was a student, give security for the debt by a *constitutum* or a pledge? 24. Did a different rule apply after he had ceased to be a student? 25. Could not the debt become actionable before this by novation, by which it is

completely separated from its original *causa*? 26. By a document drawn up after the student has left the University, the amount of the total entries against him by a creditor is fixed at a specific sum, and he has promised to pay first the interest and then, after 'he has obtained a situation,' the principal. How is this obligation to be regarded? As loan? As contract *litteris*? As *constitutum*? 27. Must the creditor prove in the action each of the several charges, or is it enough for him to prove the execution of the document? 28. Is the foregoing condition [as to a situation] fulfilled, when the debtor has obtained a position of assistant-teacher without salary or of unpaid referendary (*Referendar*<sup>1</sup>)? 29. The debtor has through inheritance or marriage acquired a very substantial property, which decides him not to seek for any situation. Can the creditor demand payment of the capital? To the defence of the debtor that the condition is not yet fulfilled, he thinks he can reply with the maxim:—*quotiens per eum fit, cuius interest conditionem non impleri, quominus impleatur, perinde haberi ac si impleta conditio fuisset*. May his claim not be established in still another way?

30. Well-to-do old maiden aunts and bachelor uncles often prove in a money difficulty a valuable resort. How is their act of affording assistance to be regarded in a legal view, when they are disposed to help? Is it a loan they have made or a present of the money? When on my request, or without my knowledge, they have paid my debts, have they a claim to be repaid? Can they in their wills deduct the amount from my

<sup>1</sup> The name applied to young lawyers, whose course of training is not yet completed (like a *stagiaire* in France). They act as assistants to the Courts.

share of their inheritance, even where they had declared they were making me a present of it? 31. A rich aunt, to whom her nephew had dedicated a book at Christmas, resolved to show her acknowledgments next Christmas and paid his debts behind his back and had the receipted accounts bound as a book with the title 'Amelia's Works or Aunt and Nephew, First Part,' with the intention of handing it to her nephew on Christmas Eve. He died before that. As regards the said payments can she, if not in a question with the creditors (why not?), yet in a question with the nephew's heirs challenge the legal effect of the gift as not yet completed? Is knowledge on the part of the donee (i. e. the psychological effect of donation as contrasted with the merely economic or financial—the enrichment of another's patrimony) a material element in donation? Can one draw an argument from the treatment of legacies or inheritance in Roman law (transmission or non-transmission of the intended benefit to the heirs of the person intended, on his death before he knows of the devolution)? 32. The Berlin *Gerichtszeitung* reports the following case:— 'A student, who wished to spend his holidays in travelling, decided to apply his cash balance at his banker's for this purpose. He accordingly wrote to the bank to send him his money in French gold, as he was intending to pass through Italy. Agreeably astonished was the young man when 208 twenty-five franc pieces came to him; he thought, however, that there might be some mistake and wrote once more to the banker, from whom he got the answer that everything was in order, his balance amounted to 208 Napoleons. The delighted student now extended his journey to Egypt, Palestine, and Greece, and only came

home when the money was coming to an end. In the meantime the banker had discovered an arithmetical error in his account, only 75 Napoleons were payable to the student, and he demanded repayment of the 133 overpaid, to which demand the student would not agree. How ought the case to be decided?

## XIII

### SOCIAL LIFE

1. A CARRIAGE ordered by me for eight o'clock in the evening, to take me to a ball, makes its appearance a quarter of an hour late, when I have already left the house; am I obliged to pay for it? Can the coachman maintain that, in order to put him *in mora*, he should have been warned beforehand not to be late?

2. I have not left the house when he arrives, or have just started on foot and he meets me on the road; am I still obliged to make use of the carriage? Is it in the first of these cases material whether I have in the meantime ordered another conveyance, or can I simply send away the carriage because it has not come at the time fixed?

3. A consequence of the long delay of the carriage may be that the ladies going to the ball, who wished to use it, have all the enjoyment, which they had promised themselves from the ball, spoiled. They were already engaged for the first few dances, and by not arriving at the ball till after these are over they find all the gentlemen known to them have their engagement cards already filled up. Can they demand reparation for this? 4. Owing to the carriage not having come at all, and another not being obtainable, they have to stay at home. They demand from the coachman damages for the expenses to which they were put in connexion with the ball, namely, the

price of their subscription ticket, outlay for the hair-dresser, ball dresses, gloves, bouquets. The coachman pleads that these expenses would have been incurred even had they gone to the ball; they were therefore not occasioned by his failure to come, and accordingly he is not bound to recoup them. Their staying away from the ball has in fact, on the whole, caused them no loss, but rather a benefit, because they saved outlay for supper and wine. Finally, he pleads they could have gone on foot. Are these defences sound<sup>1</sup>?

5. At the ball a lady dancing has her dress torn by a gentleman who tramples on it while careering recklessly; can she claim damages? The gentleman sets up the defence: whoever comes to a ball must have such mischances in view, the doctrine of *culpa* is not applicable, otherwise all pleasure in dancing would be at an end. Rules of law have no place at balls, otherwise one might expect to have an *act. iniuriarum* afterwards brought against him when he has come into collision with another pair of dancers, or upset them in dancing. There is a tacit agreement among all persons at a ball that whatever takes place there is not to be regarded from a legal point of view; to every one who takes part in it, and suffers inconveniences of the kind stated, the maxim of l. 72 *pro socio* (D. 17. 2) *qui parum diligentem socium acquirit, de se queri debet* applies. Every one must be prepared to meet with bad dancers.

6. Can we treat the refreshments given at a party as of the nature of a donation? If the host were to hand over to the poor the same food and liquors as

<sup>1</sup> This question has been slightly altered in conformity with the 12th ed.

he here sets before his guests, it would be doubtless a donation (alms); is it different because the latter instead of the former receive them?

7. The following case may serve by way of comparison: A certain person has hitherto allowed a poor widow, on her request, to cut the plots of grass in his garden as fodder for her goats. After her death there is no one who troubles to apply for it, seeing that the amount of grass in a year is too insignificant, and the proprietor finds himself compelled to seek out some one who will undertake the cutting in return for getting the grass. Is there in both cases a donation, if one can in other respects speak of a donation here and not of a temporary and revocable transfer of the use (*precarium*) of the plots requiring to be mowed?

8. A good mother thinks of her children, even when at another person's table, by putting some confectionery for them into her pocket; had a hired servant done this it would have been a *furtum*; is it the same as regards the mother?

9. Can a guest put into his pocket cigars offered to him, instead of smoking them? Or take a bottle of wine away with him instead of drinking it? 10. A certain person has invited a friend to spend his holidays with him at his country place, but afterwards without any reason recalls the invitation, or he takes away from the friend a summer residence that he had placed at his disposal for a definite period and which was already occupied by him, and lets it to another; is there in the first case a claim for damages, and in the second for handing over the rent obtained? 11. We stay at a friend's house; do we come into any legal relationship towards his servant who brushes



our clothes and attends to our letters and messages? Is the friend responsible for clothes of ours that are stolen or spoiled through the servant's negligence?

12. A person who gives a children's feast at a garden restaurant makes terms with the landlord that for three shillings the children are to have a *full feed* of gooseberries; how is this contract to be described? May not the children, instead of 'eating their fill' in accordance with the condition, put gooseberries, to the amount required to fulfil the condition, into a basket and take them home with them?

13. A person who agreed to take charge of a weak-minded person for a fixed sum, found that owing to a subsequent general rise in the price of provisions he could no longer hold to the contract, and endeavoured in an amicable way to be released from it by the other party, but without success. Since then he has treated the boarder so badly as regards food and attendance, and more than once so ill-used him, that the relatives who made the contract for him, find themselves obliged to raise an action against the contractor. What will be the nature of their action? For a reasonable performance of the contract of aliment? There is no means of execution of a judgment of such a kind. They desire that the boarder should be taken charge of by another person at the cost of the person hitherto bound; will the judge give effect to a demand of this kind?

14. A cook engaged by a person about to give a dinner fails without any adequate reason to put in an appearance, and owing to another not being obtainable the dinner cannot take place. Can the host claim that the cook should relieve him of the edibles which he has laid in for the dinner and which he in

his circumstances has no means at all of using (it was, for instance, a farewell dinner on the day before his departure on a journey) ?

14*a*. What is the nature of the legal transaction when a cook-confectioner undertakes to provide the whole dinner in the house of the host ? Do the remnants belong to him or to the host ? Would it make a difference whether the price was fixed at so much a head for each person or at a round sum ?

15. Is a promise which the host has received from a friendly neighbour to give him the use of his silver-plate binding ?

16. A person has given an order for fish for a dinner, subject to a conventional penalty of thirty shillings if not duly delivered. Can the penalty be demanded if the dinner does not take place, or if, owing to a heavy snowfall, the train by which the fish was being brought was late in arriving ? Can the merchant demand the price for the fish of which the proffered delivery is too late ? He founds on this that a delay due to *casus* gives rise to no *mora* on his part, while by Roman law the *periculum* in sale, as is well known, falls on the buyer.

16*a*. At a time when strawberries are just going out of season a housekeeper makes an arrangement with a fruit and game dealer that out of a consignment of strawberries, which he describes as his last one, he should keep four pounds for her, for a dinner that is to take place three days later, and also a haunch of venison from a particular roebuck which she has pointed out. In implementing the order on the specified day it appeared that the strawberries were going bad, while the venison was tainted, and the customer refused to accept them. Was she within her right ?

A lawyer friend assures her that she can confidently let the matter go into court, because in both cases there is a sale of a *genus*, seeing that the four pounds of strawberries, not less than the haunch of venison, had first to be separated from a whole, and that before the separation, according to l. 2 *Cod. de per.* (4. 48) *periculum mutati vini emptoris non fuit*, the *periculum deteriorationis* falls on the seller, and that this is the predominant view—Windscheid, *Lehrbuch des Pandektenrechts*, II. § 390, 9 ‘if the collection of things forming a whole, out of which the object of performance is to be abstracted, is fixed individually, but not if merely generically.’ The heap of strawberries out of which the object of performance was to be taken was here individually specified (‘this hamper’), so was the roebuck. How far is this theory to be held applicable to the case before us, and, if it ought to be rejected, what limitation arises out of it for the dominant doctrine of *periculum deteriorationis*?

17. A person about to give a party has ordered for it a quantity of wine at a wine-merchant’s, subject to agreement that the unused bottles may be sent back. How is this contract to be regarded? Is it a sale with a *pactum de retroemendo* added? Or are only those bottles to be treated as sold which he has used? How now, if through *casus* some of them are destroyed? Upon whom does the *periculum* fall according to the one or the other interpretation? Can he get rid of his responsibility on the ground that by his agreement he has to pay only for those that he has ‘used’? 18. The case has a similarity with those which often arise in drapery establishments; the clothier sends to a lady customer, who

has her dresses made at home, a whole piece of the dress material chosen by her, in order that she may cut off from it what she needs. Wherein lies the difference? Is the person who gave the order liable for *casus*?

19. Among the bottles which the customer sends back are included some that a person engaged to wait at table has without his directions uncorked, though otherwise in no way used; the wine-merchant will not take them back, while the customer maintains that they have not been 'used.' Must he keep them, and, if so, has he a claim against the waiter? Would he be able to sue a third party who had uncorked them in order to play a practical joke on him or out of curiosity? The *act. legis Aquiliae* requires that some damage to a thing be done, and there does not seem to be any here, as the mere drawing of the cork does not make the wine worse.

20. Through oversight of the servants the unused bottles are not returned for a long time, and the wine-merchant declines in the end to take them back. Is he within his right? A date for sending them back was not fixed by the agreement.

21. The bottles are sent back on the day after the dinner, but owing to their having been put in ice for cooling, or in warm water to warm them, the labels have come off and been lost. The wine-merchant refuses to receive them, because he has no certainty that they are the same bottles that he sent. The person who gave the order maintains that he could have no such certainty in ordinary circumstances, because he, the customer, could have taken off the labels and stuck them on other bottles; that everything depends in such a matter on trust and confidence.

22. But further the wine-merchant will not assent to the heating and cooling—the wine might suffer from it, e.g. a fine claret if it were quickly heated; such act moreover implied a ‘using,’ and on this ground he holds that he does not need to take back the wine, even though it may not have suffered in the least.

23. The wine was so bad that every one at the party was made ill by it; have the guests any claim against the host if he knew the quality of the wine? Would it not depend on the motive, e.g. whether stinginess or a bad intention to do his friends an evil turn have influenced him in choosing the wine? Can they, or can he, sue the wine-merchant?

24. A person giving a dinner-party orders for it at a china shop a quantity of plates, with an agreement that for those sent back uninjured he should pay twopence the dozen, while for those broken he should pay fivepence each. Is this a contract of sale or of hire, or a combination of both?

25. In sales by retail at wine shops a price is put upon the bottles apart from the wine, which is returned to the purchaser when the bottles are sent back. How is this to be regarded? As a deposited pledge for restitution of the bottles or as part price in a sale with a resolute condition?

26. A traveller in the wine trade having been told by a person whom he importunes to take some wine that his circumstances do not at present permit of his giving an order, puts the customer at his ease by saying he can pay when it suits him. Several years have in the meantime passed by, and the customer has made answer to each renewed application for payment—‘it does not suit him at the present time.’ Can the wine firm sue him for payment, or must it

content itself with the same answer so long as the customer lives?

27. A guest upsets a bottle of claret and thereby spoils the table-cloth; can damages be claimed from him by the *act. legis Aquiliae*? Or can he effectually set up the above (No. 5) point of view—social relations are not governed by the law of *culpa*? How now, if he negligently knocks down the mirrors, smashes the vases and busts, pitches a lighted match or still burning cigar into the paper-basket, and so on, is he still free from liability? People who visit us uninvited or who come to us merely on business matters are in all cases liable for their *culpa*; does an invitation imply a renunciation of the right to hold a person liable for *culpa*?

28. A person has ordered a pie at a confectioner's, which he wishes to give to a lady friend on her birthday, but by mistake it is delivered to another lady lodging in the same house, who eats it. Is she liable if this has happened *bona fide*? Has the first-mentioned lady, if the mistake is discovered in time, a direct action against the latter to deliver it up<sup>1</sup>?

29. In many games of cards the losses after each game, instead of being at once paid in cash or by document in writing, are settled by counters, which stand good as vouchers of debt, and at the end of the game are redeemed by the several players; have these counters any significance in law or merely in fact, i. e. do they represent a promise on the part of the players or do they serve only, like writing, as evidence of gains and losses?

30. The use of unstamped playing cards is forbidden; are they on this ground to be reckoned among *res extra*

<sup>1</sup> Cf. *ante*, X, No. 31.

*commercium*? Is their sale valid? 31. A person has staked at play a five pound note which, though unknown to him, is forged, and in respect of it has ultimately won £500. The holder of the bank demands back the whole amount because the stake on the table was not genuine; assuming there has been a stake put down ten times (the first note being used each time), can the bank-holder claim back, if not the whole, a part at least of the amount, or must his claim be rejected on the ground that he has allowed the forged note to be treated as a good one?

32. A person has by mistake gone off with a hat not his own, and on his way it is injured; is he liable? 32 *a*<sup>1</sup>. Is the owner of the abstracted hat also liable, if he, in order not to have to go home bareheaded, has put on the other's hat that was left behind, and it is injured on the way? 32 *b*. If the exchange fails to be afterwards rectified, can the two parties who appropriated the hats not their own continue to wear them, or is there in this a *furtum usus*?

33. During a heavy storm of rain a friend takes my umbrella with him, and in passing over a bridge a sudden gust of wind carried it out of his hands into the river, presumably without his fault. Must he replace the umbrella? Would it be of importance whether he had taken it with or without my permission? Would knowledge on my part stand for permission? Would what applies to a friend also apply to a stranger?

34. A person has by mistake left his umbrella at my house; am I liable if it is stolen or injured by my domestics, who make use of it? 35. May he at his own hand, without asking my leave, take it again?

<sup>1</sup> This and the next question are from 12th ed., Nos. 35 and 36.

The question depends on this, whether he was still possessor and whether he is thereby merely exercising his right of possession? 36. How if I have taken it to my house and refuse on some frivolous pretext to restore it to him, can he take it from me by force? What legal remedy has he by which to enforce restitution? Must he in order to recover it prove his right of property, or is the simple statement of the case as above described sufficient? Must the Roman *interdictum utrubi* be taken into consideration for the purpose, or does the Roman law not afford still another remedy?

BY THE TRANSLATOR.

[37. A person hires a horse at a livery stable for an afternoon's ride. He brings it back lame, but there is nothing to show how the lameness was caused. Is he liable in damages? How if owing to his being a bad rider he had let it fall and injured its knees, would he then be liable? Supposing that having hired it for an ordinary ride he has taken it into a field and caused it to jump ditches, and the horse is afterwards found to be suffering from a strain, would he then be liable, even though there was nothing to show that the strain was due to the jumping?]



## XIV

### AT THE THEATRE

1. A PERSON residing at a distance from a theatre telegraphed to the box-office to keep a place for him at a forthcoming performance, but owing to a business engagement he is prevented from making the journey; must he pay? He objects that the contract was not completed as he got no reply: an acceptance of the proposal by the other party is a pre-requisite of a contract. He relies further upon the hindrance by business. Would the circumstance that he employed in the telegram the expression *requests* or *begs* a place to be kept for him, give it the character of a mere request, which is not as such of an obligatory nature?

2. What is the nature of the contract which one enters into with the theatre managers by taking a ticket? Hire of a seat? *locatio operis*?

3. Is the notion of hire not appropriate at least for the boxes which are let by the year? Is there any legal right to demand that the performance announced shall take place?

4. Is there a legal remedy against a person who forces himself into our box? a possessory remedy against disturbance of possession? Are we justified in ejecting him by force from our box if he will not withdraw? Would he by Roman law have an *act. iniuriarum* if we laid hands on him under such circumstances?

5. We have taken a box ticket for an evening performance, which bears 'Box No. 15, for 6 persons'; can we only bring a party of six, or may not these words be read in another sense than as a limitation to a definite number of persons?

6. The managers of a theatre had given directions that no tickets should be issued to the dramatic critic of a particular newspaper, who had constantly given unfavourable notices of the performances; were they entitled to do so? This person had a ticket taken for him by a friend, he was however all the same refused admission; is this case open to the same decision as the preceding one?

7. Is a person who has been given or has purchased the pass-out ticket of another, who left the theatre after the first act, entitled to demand entrance in respect of it? The managers maintain that they can prohibit this—were it otherwise any one who has, say, eaten the first half of a dinner at a *table d'hôte* or at a public feast, might similarly withdraw and send in another in his place, and so two persons could, though the charge is for one cover, have a sufficient meal; they do not give their performances in portions but as a whole, and, just as little as they give out tickets for single acts, so little may this take place by the action of ticket buyers. 8. The purchaser of a theatre ticket discovers, after he has looked at his seat, that one can neither see nor hear properly from it, and demands back the price; is he justified in this, or has the management a good excuse in saying it has guaranteed him only a seat in the theatre, and he has got a seat?

9. Bouquets of flowers are thrown on to the stage for a *prima donna*; is there in this a *iactus missi-*

*lium*? One of the bouquets that fell at the back of the stage is seized by one of the female chorus singers standing there and not delivered up. In it there was a costly brooch, which she however has not discovered; has she stolen it? Whose property is the brooch; that of the person who threw it, or the chorus girl, or the *prima donna*?

10. A theatre manager announces a performance at advanced prices, in which 'Lucca'<sup>1</sup> will appear; every one takes tickets, afterwards it comes out that the singer expected is not the well-known one, but an unknown and insignificant singer of the same name; must the manager take back the tickets? He objects, (1) he has not announced her as the celebrated Lucca, (2) every one must have surmised that the celebrated Lucca would not give her services at the theatre in Z.

11. At an advertised opera performance the place of the *prima donna*, who is in a pet about something ('*verstimmt*'), and consequently is not in voice ('*bei Stimme*'), is taken by some one else; is the management bound to return the money for the tickets? Does the notion of *dicta promissa* apply even to the cast of the performers? Absolutely or under limitations?

12. Must the management in such case make good to non-resident ticket holders the expenses of their journey?

13. Can those who have bought their tickets from intermediary agents at advanced prices, demand back from them, in case of an alteration of the programme, either the whole amount paid, or simply the box-office prices, or anything at all? The latter think

<sup>1</sup> A famous operatic singer in the latter half of the nineteenth century.

that they can escape all liability on the ground that they had only sold ordinary tickets for the day, and that the alteration of the programme is a *casus* which falls on the buyer.

14. Can the managers make a lady singer answerable for a falling off in the takings for the day which can be proved to have been caused by her mere caprice? Would a private patron of music, at whose evening party she has undertaken to sing for a fee, have in the like case a claim against her?

15. Does it constitute a gift when some one buys several dozen tickets for the benefit performance of a lady singer, which he has no intention of using? His motive was doubtless that of a voluntary contribution, but is that enough to allow a jurist to regard it as a gift?

16. A writer of plays has handed over a work of his to the managers of a theatre for production, upon an agreement for a fixed proportion of the receipts. How is the contract to be characterized legally? As an innominate contract *facio ut des*? Or does not another nominate contract of the Roman law suggest itself here?

17. What contract arises when a fixed royalty is assured to the author for each performance of the piece, or when he has transferred once for all the right of performance by way of licence for a specified sum?

18. In the last-mentioned case would the author or the managers get the benefit of an extension of the statutory term of copyright? The latter maintain that they have acquired the right of production for so long as the right of the author subsists, and that, as it now lasts longer than formerly, the extension of

time must be for their benefit. The author contends that, in fixing the equivalent for the permanent transfer of the right of representation, the existing period of copyright had been taken as the measure by both parties; that the case is the same as if a usufruct has been granted to some one for twenty years and he sells it to another for a fixed sum, and then the period of the usufruct has been extended. Is the sale of a usufruct possible?

19. May the author in all these cases conclude a contract of similar import with a rival establishment in the same locality?

20. The managers of a theatre in *Z* have engaged on brilliant terms the insignificant singer Augusta *X*, having mistaken her for her celebrated sister Antonia *X*. The error is first discovered after she has given up her existing engagement and arrives at *Z*. The managers refuse, on the ground of essential error, to fulfil the contract in her person; has she a claim?

21. Can a singer who has been hissed in a wholly unjustifiable manner, and solely by means of an intrigue, raise by Roman law the *act. iniuriarum* or the *act. doli*, or perhaps both, against the ringleader, who is known to her? What would be the appropriate line to take as regards the last-mentioned action<sup>1</sup>? Would a non-professional singer also, to whom this has happened at a concert, have the same right?

22. From what point of view in Roman law would slipping secretly into a theatre be regarded?

23. In the contract which the manager of a travelling theatrical company made with the members,

<sup>1</sup> For English law see *Gregory v. Duke of Brunswick* (1884), 6 M. & G. 205, 953.

section six ran as follows: 'In the event of fire, war, contagious disease, permanent illness of a member, national mourning, political revolution or other calamity, the manager has a right to dissolve this contract in all its parts.' Has he the right to do so if his wife dies ('other calamity'), if the Government makes a *coup d'état* ('political revolution'), if one case of 'contagious disease' occurs in hospital?

24. Section eight ran: 'Mr. N. N. accepts the existing laws relating to theatres and those that may yet be passed, submits himself to them so far as they contain nothing inconsistent with the contract, and regards them as an integral part of the contract.' Is this provision valid?

25. Can the manager by his own authority increase the penalties threatened in the contract or set up new ones?

26. The following appeared in American newspapers: 'President Cleveland sent to the box-office of the Paris Circus at Washington and engaged a box for the evening.' The manager at once hastened to a casual printing-office in order to get out new bills; half an hour afterwards there was posted up in the streets: 'President Cleveland and his newly married, young, and beautiful wife are to be present to-day at the circus.' The object was attained, the house was full to overflowing; only the President, whom it probably had displeased to see himself printed as an item in the programme, did not appear. At the close of the performance a portion of the audience stormed the cashier's office and demanded the return of half their entrance money, complaining that what the bills announced had not been fulfilled. How is the case to be decided?

BY THE TRANSLATOR.

[27. It frequently happens that large hats or coiffures worn by ladies at theatres effectually prevent persons sitting behind them from seeing much of what goes on upon the stage. Has a spectator, whose view of the stage and consequent enjoyment of the play is thus interfered with, any remedy against the lady who is the cause of it? Or against the managers of the theatre who allow it?]

## XV

### AMONG MUSICIANS

1. A PROFESSIONAL musician who has been invited to an entertainment has, on the request of the host, played a piece ; can he claim a fee for this ?

2. Is it necessary for the host, in order to secure himself against such claims, to add, when making the request, that he asks it as a gratuitous favour ?

3. A porter, who was sent by the host to fetch the musician's violin, laid it down in the vestibule, from whence it was stolen ; is the host liable ? He thinks that he is bound, according to the passages cited above (XI, No. 10) from the Roman law, at the utmost for payment of the price of an ordinary violin, while the one stolen was reckoned at the unusually high price of £350.

4. How do matters stand if he ask a professional with whom he is unacquainted to take part in a musical soiree which is being got up by him ? Is it necessary in this case to assure the musician of a fee ?

5. A musician, who is on terms of friendship with me, has for a long time taken part in a string quartette in my house. - Afterwards we fall out and he demands payment for his past services ; am I bound to pay ?

6. After he has played in the evening he leaves his 'cello behind him in my house, intending to take it away next day ; is there in this a mere physical act imposing on me no legal duty, or a relationship of



law that makes me liable for *culpa*, and what kind? Am I liable for *culpa levis* or *culpa lata*?

7. Can I set off against his claim any skilled advice which I, as lawyer or physician, may have given to him while he was entertained by me?

8. He has frequently brought with him newly published quartette pieces, which were tried at my house and have remained lying there after for weeks together. On the hypothesis that he himself has a lending library of music, could he not on account of these pieces make the usual lending charges?

9. From one of these quartette scores, which he has left with me in this way, one of the parts has, without any act of mine, gone amissing. Am I responsible? If this question is to be answered affirmatively, must I not then likewise be responsible if invited guests, in the expectation that I would ask them to play at my party, have brought music with them, and this becomes lost at my house without my fault?

10. Is it enough that, in the above case, I pay for the lost part one quarter of the price of the whole quartette?

11. I have corrected printer's errors in one of the parts, which in the litigation between us my adversary does not dispute to be such; yet he demands that I shall replace the work by a new copy, because I have damaged it. Would it make a difference whether he had already used the work for his own performances, or in his lending-establishment, or had kept it as a sale copy in his place of business? Is it of importance whether the printer's mistakes have been corrected by me with ink or with pencil?

12. I hand over to a violinist a fiddle offered to me

for purchase, that he may test it ; what kind of legal transaction is this ? For what degree of *culpa* is he liable ?

13. Four musicians set up a string quartette for the purpose of common profit. In their contract they bind themselves to the necessary rehearsals, and to travel annually for concert purposes during the six winter months, the conducting as well as making the necessary contracts is entrusted to *A*, the first violin, who is to receive on this account two-fifths of the net receipts, while each other member gets one-fifth. In the third year *B* takes a permanent appointment and withdraws from the contract, which has this disadvantageous consequence for the three others, that they must give up their concert journeys the next winter, because they must practise anew with the musician who has taken his place. Can they on this ground claim damages from *B* if the contract was entered into for a definite number of years ? *B* maintains that one can withdraw from a contract of partnership at any time, even if a fixed period of duration has been agreed upon. 14. Are the rest bound in this case to go on with the contract ?

15. A dispute arose about the proceeds of music which, so far as not already in possession of individual members, had to be purchased out of the takings. On the dissolution of the connexion *A* wishes to apply to the stock of music the above mode of division of two-fifths and one-fifth, while the others claim a division into equal shares, because there was here no question of net proceeds (*Reinertrag*), but one relating to a common inventory of stock, and they think they can support this point of view by the assertion that each of them

has possession and property in his *part*. Is this assertion well founded? How should the division be made?

16. Do the costs of repair, which one particular member has had to make on his instrument, fall under the common expenses which have to be subtracted from the receipts?

16 *a*<sup>1</sup>. Are the members liable *pro rata* or *in solidum* for the rent of a hall hired for one of their performances?

17. The first violin has, on occasions of the quartette performances at various Courts, received, apart from the fee which he has put into the cash-box, various presents which he has kept to himself; in these the others now claim to participate; are they justified in this?

18. A choral union contemplates producing an oratorio 'for the benefit of sufferers from the inundation at X,' and sends round beforehand a circular asking for subscribers' names; are the signatories to it bound?

19. Cannot the subscribers at least withdraw if a lady singer, whose participation was announced in the programme issued, should afterwards not appear? Would it be a point of importance if it was only stated in the programme 'it is hoped to get this singer'? Can the lady herself, whose appearance has been announced without her consent to participate being obtained beforehand, take proceedings on account of this?

20. The committee of the choral union, which has arranged the concert, wishes, after it is over, to apply a part of the receipts to a different object from that

<sup>1</sup> From 12th ed., No. 16.

announced. Is it justified in this, or cannot those who have provided the money, i. e. all those who have taken out a concert ticket, insist upon fulfilment of the method of application set out in the concert programme?

21. Can the sufferers 'from the inundation at X,' or some one in their name, do this?

22. Would it make a difference if the money had been collected by sending the hat round? What position legally would in this case the collectors hold towards the givers and towards the persons for whom the money was destined?

23. The committee, which has placed itself at the head of the undertaking, has deposited the sums contributed with a banker, and the latter declines to pay them out again to it, on the ground that a committee is not a legal person and cannot therefore sue, only the donors of the contributions could have a right of action; can the committee sue? Can the contributors do so?

23 a<sup>1</sup>. If a member of the committee becomes bankrupt, do the moneys received and not yet expended belong *pro rata* to his estate? And if not to whom do they belong?

24. Does giving one's name as an annual contributor for any public object create an obligation for life, or cannot the subscriber, if bound to make good the amount for the first year, refuse it for the following year? It seems to be against this view that he has bound himself not for a particular year but absolutely.

25. A firm of music-sellers concluded a contract with a professional musician, who had aroused the

<sup>1</sup> From 12th ed., No. 24.

greatest public interest, whereby he made over to them the receipts of ten concerts to be got up by him at *X* on their account, in return for a lump sum of £1,500. How is the contract to be characterized in Roman law?

26. In ordering musical instruments for third parties teachers of music receive from the makers a certain percentage on the price; are they bound in accordance with the rule '*ex mandato apud eum, qui mandatum suscepit, nihil remanere oportet*,' l. 20 *pr. mand.* (D. 17. 1), to account for this amount to their mandatories?

27. In giving music lessons it is very common to have a ticket, marked with the name of the pupil or his or her parents, handed to the teacher upon each lesson; in what does the significance of this consist in a legal view? See a similar question in XIII, No. 29.

## XVI

### AT A RAILWAY STATION RESTAURANT

1. ON the buffet various kinds of food and drink are spread out; does this setting-out produce any legal consequences, is it distinguishable from the exposure of wares in a shop window, or from the announcement of food and beverages on a bill of fare, is it to be regarded as an offer?

2. From what point of view is the appropriation of food and drink on the part of the customers of their own accord to be regarded? From that of *occupatio*?

3. Can the restaurant-keeper demand from them what price he pleases, supposing they have not asked the price beforehand?

4. How is the action of a guest to be regarded in law who having no money has had food and drink served up to him?

5. I have ordered a beefsteak, having been assured beforehand, in answer to a question I put, that it can be got ready in time; it makes its appearance as the signal to take seats is given. Can I refuse to accept it? The restaurant-keeper denies this, because he has on his part promised nothing more than to get it ready in time, and it has been got ready in time, i. e. before the departure of the train; to eat it is the guest's affair, he can wrap it in a piece of paper and eat it on the journey, this happens daily as regards sandwiches.

6. A person has ordered a waiter to bring him a glass of beer, and as it does not come he again orders another waiter to bring one; must he pay for both? Would it be a point of importance that in giving the second he referred to his first order?

7. I sit down on a chair; is that a proceeding which has legal or merely *de facto* consequences? Does it create legal possession, *detentio alieno nomine*? Is the landlord entitled to deprive me of the chair? May I resist if a third person does so? May I take the chair from him again by force? Does the doctrine of possession protect me?

8. By inadvertence a person sits down on a hat which he had not noticed was on the chair, has he to pay for it? This case came recently before the court at Mainz.

9. On the chair there is a nail sticking out by which a guest has his trousers torn; can he claim damages from the landlord? The latter maintains that there is here no contractual relationship binding him to *diligentia*, and that in a non-contractual relationship one is bound only for *culpa in faciendo*, which is here wanting. This case also was the object recently of judicial decision in relation to an innkeeper. Would it in this case be of importance whether the chair had been in a visitor's private room or in the public room of the restaurant?

10. A seat placed before the door for the use of guests has been newly painted without any express notice of this having been given; is the landlord liable for the spoiled clothes?

11. A guest appropriates to himself the whole stock of matches which is placed in the restaurant for general use. He maintains his power to do so on the

## 136 AT A RAILWAY STATION RESTAURANT

ground that these objects are left for the public to make such use of them as it pleases, they are in a certain measure *res communes omnium* or *res usui publico destinatae*.

12. If a guest helps himself to some article which in public restaurants is put out on the tables for use without charge (e. g. bread, salt, pepper, mustard, vinegar, oil, toothpicks), does he acquire the property of the particular piece or quantity which he thus separates from the mass? What mode of acquiring property comes here into view?

13. The acquisition is obtained without valuable consideration; is it therefore a donation? For comparison we may point to the following cases of gratuitous acquisition of property: forwarding book catalogues, specimen numbers of journals, samples of groceries by a grocer, or of wine by a wine-merchant. Even the letters which we receive, and the visiting-cards which are left at our house, are objects of property, and undoubtedly become our property. Can we in respect of the element of want of consideration in these cases admit the idea of donation?

14. When the restaurant-keeper hands to a beggar a piece of bread is this on all fours with the case of a guest cutting off a piece from the loaf for himself?

15. A guest has upset the cruet-stand and spilt the salt, pepper, vinegar, and oil. He refuses to pay damages, maintaining that these things were never charged for at a *table d'hôte*. Is this so; must the landlord, for example, submit to a guest pouring out the whole of the oil or vinegar in the bottle upon his salad, or feeding his dog with the bread?

16. A peculiar branch of industry which is carried on here and there in large restaurants, especially in



public gardens, consists in this, that individuals, under the pretext of doing something or other in them, pick up for themselves all scraps left by the guests (e.g. pieces of sugar from the coffee, bits of bread uneaten). No landlord would take legal proceedings against such persons. Nevertheless, to assist one in forming right judgments, it is useful to look at this question from a juristic point of view. The question arises, to whom do these remnants belong? To the landlord? It can be pleaded against him that he has transferred the objects, of which these are but the remains, in property to the guests. To the guest? He has left the remnants and gone away, and so has abandoned them. Or had he perhaps the intention to re-transfer them to the landlord? Or do they revert to the ownership of the latter *ipso iure*? If, as it seems, these remnants are ownerless, by what right can the landlord prevent occupation of them by any third party, for it is a well-known rule that things without an owner can be acquired by any one by occupation?

17. A cigar-case forgotten by one of the guests is picked up by another guest, who puts it in his pocket; the landlord claims it on the ground that he has the exclusive right of taking possession of things in his restaurant; is that so<sup>1</sup>? Might not his claim be effectual from another point of view?

18. In the waiting-rooms at a station there is often a notice 'Dogs not admitted.' Can a man with a performing bear bring his bear into the waiting-room, or a farmer his pig, or a butcher his calf? From the *argumentum a contrario* it seems to follow that all other animals except dogs may be brought in.

<sup>1</sup> For English law, cf. *Bridges v. Hawksworth* (1851), 21 L. J. Q. B. 75.

Why should dogs only be named in the notice, and not also cats, pigs, calves, &c.? Is this inexactitude of notice open to complaint? Is the notice to be judged of differently from a statute?

19. The second class waiting-rooms are often occupied by persons who have taken or intend to take third class tickets. Can the Railway Company insist upon their taking second class tickets, on the ground that by using the second class waiting-room they have notified their intention to travel second class?

20. A waiter at a railway restaurant has promised a traveller to let him know when the train is about to start, but has neglected to do so, and the traveller has thereby suffered a loss of forty shillings, as his ticket loses its validity and he must put up for the night at the place. Must the waiter recoup him? What action suggests itself?

21. Would it make a difference if the waiter intentionally, in order to play a trick on the traveller, has omitted to give him notice?

22. How is the position of the waiters towards the restaurant-keeper to be judged of as regards the particular articles of food and drink, which they either pay for at once in cash, or for which they give counters which they afterwards have to redeem in cash at the nightly reckoning-up? Do they buy such food and liquors, or do they take them merely as agents, subject to a prior cash payment for the counters received or a subsequent payment for those used? What significance in law have the counters? (See XIII, 29; XV, 27.)

## XVII

### PUBLIC PLACARDS

1. If a person objects to placards being posted on his house, what action according to Roman law can he bring in order to prevent it?

2. A bill-posting-contractor<sup>1</sup> has, before the house came into my hands, put up his posters on it during twelve years. Has he by Roman law a quasi-possessory remedy if I prohibit him from doing so?

3. What legal relation is created if I give him permission to do so henceforth? How is the relationship to be described if I make it a condition that he pay me a yearly sum therefor?

4. How if I accord him the right to do it once for all for a fixed sum? Does he thereby acquire merely a claim against me or also against the purchaser of my house, and, supposing the latter is affirmed, what would be the legal relation thereby created as regards the house? A praedial servitude?

5. What legal effect does the posting of the placards produce as regards possession and property in them?

6. In large towns there are individuals who make it a business to tear off the posted placards in order to get the paper, what legal remedy have those who posted them against this? A real action based on property?

<sup>1</sup> In large towns there are business people who have so organized the system of posting placards that, for a fixed sum, they will by their employees post them up in all important places.

7. A rival tradesman has during the night smeared over with black the name and address of another tradesman on notices placarded by the latter in various places in the town, or has posted his own name and address over it. Can an action be brought against him, and what kind?

## XVIII

### AT SEA

1. SEVERAL persons carry on business with a ship they own in common; in what legal relation do they stand to each other?

2. In what relation do they stand towards passengers and shippers of goods, with whom the captain appointed by them contracts?

3. Are they as a matter of course liable for his contracts, e.g. even if he hypothecates the ship in order to provide for necessary repairs, or if he sells it in order to pay his own debts with the money?

4. In what proportions do they incur liability by Roman law? According to their shares in the ship?

5. The captain obtains a loan of money in a foreign port which is to be repaid at the port of destination; is this a *foenus nauticum* (bottomry)?

6. When is there a *foenus nauticum*? Can it be entered into independent of interest being paid? Wherein does this kind of *mutuum* vary from the regular form? Is its object to take the money on board and bring it with the ship to the port of destination?

7. May the captain tranship the goods into another ship than that contemplated by both owners and shippers? How, if the latter ship sinks? Must the captain make good the value of the cargo? Does this question admit of a simple answer, or does it not depend on circumstances?

8. In order to float a vessel that had run aground

the captain has jettisoned the goods, do these thereupon cease to have an owner or possessor? Does it make a difference in this respect whether this has occurred out at sea or on the coast at a place where one might expect they would be driven on shore by the waves, or where, if sunk, they might be recovered? Does the throwing of logs into a river to be floated down stream (XXI, 1) stand on all fours with throwing things into the sea?

9. If the inhabitants on the beach take possession of the things that have drifted ashore, is this as a matter of course to be characterized as *furtum*?

10. Can they by Roman law demand a payment for their trouble? Would the owner not be able to meet this claim by saying that they had done it with a view to their own gain, not for his sake?

11. For the purpose of recovering the goods has he only power to raise an action based on property, or has he also a possessory claim and one based on obligation?

12. Logs of wood thrown out have been driven upon private land and have caused damage there, must the owners or the captain pay damages?

13<sup>1</sup>. Does the owner of goods jettisoned and lost obtain compensation for them? From whom, and to what amount?

14. Instead of waiting for the flood tide which would have floated the ship again, the captain has preferred to throw goods overboard, or he has, in order to save himself and the crew trouble, thrown overboard bales of cotton, bags of tobacco, &c., in place of heavy articles of cargo. What consequences has this for him?

<sup>1</sup> See l. 1 § 1 *ad Leg. Rhod.* (D. 14. 2).

15. A passenger has shoved aside an article of cargo, stowed away in a secure place on the deck, in order to put his luggage there; if in consequence of this it has fallen overboard would the Romans have granted an *actio legis Aquiliae directa* against him?

16. Can and must the captain in this case protect the interests of the absent owner of the articles, and how?

17. The vessel has been driven on the beach and the lifeboats are full. A passenger who has not managed to get a place offers a sailor who is in one of the boats £50 if he will give him his place, and this is accepted. Both reach the land and the sailor makes a claim. The passenger answers that the promise is a nullity; it was given in a state of circumstances in which there could be no accountability, and at any rate under the influence of '*metus, qui et in homine constantissimo cadat*,' l. 6 *quod met.* (D. 4. 2).

18. Would it make a difference if the proposition had originated not with him but with the sailor, and the amount demanded had been paid at once? Would there not be an extortion in this case? And if this question be answered affirmatively, what action would be here appropriate? The *act. quod metus causa*? The *act. de dolo*?

19. The passenger, who no longer sees any means of rescue for himself, presents his purse, which is well filled, to a sailor who expects to save himself by swimming. Can the passenger contest the gift if he is himself rescued?

20. Can his heirs do so if he himself perishes?

21. Does a gift which a passenger makes to a sailor, who at the risk of his own life has brought him to

land, come under the ordinary rules regarding donation, or has the Roman law laid down anything special for it?

22. In a shipwreck a father with his two sons perished, of whom the one was a minor the other being in majority; there is no means of saying which perished first and which last. Both children had property of their own inherited from their deceased mother. Regarding the inheritances of these three persons, a controversy arose between a brother of the deceased father and a half-brother of the deceased children on the mother's side; who succeeds, and what falls to the inheritance of each of them?

22 a<sup>1</sup>. The North German Lloyd announced that it would send a steamer from Bremen to a review of the Fleet to take place on a fixed day at Spithead. The steamer sailed in good time with its passengers for Spithead, but because the review had been put off for some days owing to unforeseen circumstances, and the steamer was required for other purposes in Bremen, the captain, despite the remonstrances of the passengers, sailed back to Bremen. Can the passengers claim back their fares? Is the case on all fours with that of a window being let at a high price to view a procession, but the procession is abandoned or is postponed?

BY THE TRANSLATOR.

[23. *A* has consigned a parcel of goods to a foreign port by the ship *B*, a general carrier. On the ship's arrival at its destination the parcel is not to be found. What remedies by Roman law had *A* supposing (1) that there is no evidence to account for its disap-

<sup>1</sup> From 12th ed., No. 24.



pearance, (2) that it can be proved to have been thrown overboard by a passenger, (3) that it can be proved to have been stolen by one of the sailors?

24. To avoid shipwreck some goods belonging to *A* were jettisoned. Portions of them were found on the beach at *Z* some days after by *B*, who took possession of them and kept them for more than a year. *A* in the meantime had received contribution on general average adjustment from the owners of the ship and cargo in the ordinary way. Could *A*, on hearing afterwards of *B*'s possession of the goods, re-vindicate them according to Roman law? Could they be acquired by *B* by prescription?]

## XIX

### LEGAL RELATIONS WITH THE POST OFFICE<sup>1</sup>

1. WHAT legal relation is created between me and the Post Office when it accepts a letter from me? 2. Is it a material circumstance whether I pay the postage or not? In the former case, seeing that an equivalent for the expected performance is given by the person who makes the contract, such contract should, *quoad* him, be regarded as one for valuable consideration (*do ut facias? locatio operarum, operis?*); in the latter case it falls apparently among the gratuitous contracts, because it is not I but the addressee who has to pay the postage. 2a<sup>2</sup>. Is the Post Office bound on general principles or by common law to take care of letters confided to it? 3. Does it make any difference in law whether one pays the postage of the letter to the officials or puts on a stamp? 4. What in a legal view is the nature of postage stamps? Are they money issued by the postal authorities and destined, when affixed to letters, to serve as money payment? Do they belong to the class of documents payable to bearer? Or how otherwise are they to be understood? Is sale of them in the ordinary popular sense to be regarded as sale

<sup>1</sup> See also VIII *supra*. The questions in this section have to be answered on general principles, and apart from any specialities arising from the Post Office statutes.

<sup>2</sup> From 12th ed., No. 3.

in a legal sense? 5. In transmitting money they frequently serve to represent amounts smaller than the lowest denomination of bank notes or postal orders; may one therefore describe them as money? Is one compelled on such occasions to accept them as a mode of payment? If one has accepted them, how is the act to be described in law? As payment?

6. Is settling for the postage of an unstamped letter payment? Payment presupposes an obligation; does such exist in the person of the addressee? Or as performance to meet the counter-performance (*do ut des*)? 7. Has the addressee a claim against the Post Office to deliver up the letter? Would he, in order to establish his claim, require to found on the modern theory of contracts in favour of third parties, or does not strict Roman law afford a point of view that would extend to it? 8. Assuming that such a claim can be legally deduced, would not the addressee be able to refer the Post Office to the sender on its counter-claim for the postage?

9. The letter is lost or delayed in delivery; is the Post Office (apart from special postal regulations, the question being rather to be decided purely by Roman law) liable for the whole damage sustained, extending perhaps to hundreds of pounds? 10. The letter has been opened at the Post Office by an official; has the sender or the addressee an action in respect of this? The *act. legis Aquiliae*? The *act. de dolo*? 11. It is possible that both of them have thereby suffered heavy pecuniary loss (e.g. through important commercial intelligence being communicated to a competitor, through a secret manufacturing process being made known, and so on), can they in this event proceed against the Post Office instead of the official,

who may be unable to pay? 12. Is their claim against the official dependent on the condition of pecuniary loss? If it were so one would have no legal means of protection by private law against the opening of letters—my landlord, the porter of an hotel, and whoever otherwise got into his hands letters directed to me, could without risk open them; does the Roman law afford assistance against this?

13. Does possession and property in the letter which I post pass to the Post Office? Or to the addressee, as being represented by the Post Office? Or do both remain with me? 14. Upon delivery of the letter does the addressee acquire it in property? 15. If the answer be affirmative may he print the contents<sup>1</sup>? Can the question be answered simply by yes or no? Is there any conception of delict in Roman law which applies to the unauthorized publication of my letter? 15 *a*<sup>2</sup>. To whom do the stamps stuck on a letter or parcel sent by post belong? 15 *b*. A person sells paper, that has been written upon, to a grocer for paper bags, can he do this also with letters that have been addressed to him? 15 *c*. May we present the letters written to us by notable people to an autograph collector? 15 *d*. Is the sender of a letter, who has made in it confidential remarks about a person, of a derogatory character, liable to an action if the letter without his fault falls into the wrong hands and is actually published? Would the receiver be liable if the letter has passed out of his hands without his fault? Is

<sup>1</sup> For English law see *Pope v. Curl* (1741), 2 Atk. 342; Copinger on Copyright, pp. 24–8, and cases there cited.

<sup>2</sup> From 12th ed., No. 17.

there any one in this case against whom the person insulted can bring a claim?

16. The relation between the sender of a letter and the Post Office takes a specially interesting form when the letter is put into one of the boxes placed for collection of letters. Has the setting-up of such boxes by the postal authorities merely a *de facto* or has it a legal significance? Answering this is the same as answering the following question: when is the contract concluded between the person posting and the Post Office? At the moment when the Post Office, by one of its postmen, first takes into its charge the letters lying in the box, or at the moment when the letter is put into the box? 17. If the latter, how is this arrangement for collection to be described in law? As a means for contracting *in incertam personam* in the nature of a general offer? 18. On letter-boxes the hours are usually indicated at which the letters are regularly lifted; assuming that this lifting is on some occasion neglected, can persons who have posted letters and have suffered prejudice owing to the delay in collection make a claim on this account against the Post Office, and how must they frame it? Would the question in No. 17 be of importance here? 19. Is the Post Office liable if the letter-box is broken into and the contents abstracted? 20. Is it liable if the box was not locked at all, or the lock, or the fastening, or construction of the box were so defective that the letters therein could be taken away without exercise of any special dexterity or force?

21. Letter-boxes may also be possessed by private persons. When is a notice, which must at latest be given on December 31, to be reckoned as given if

the letter which contains such notice is put into the box at six o'clock on that evening, the box not being cleared till the following morning; on December 31 or on January 1? Is it of no importance for the decision whether the letter was put into the box at six o'clock or at ten or eleven o'clock in the evening? 22. When is possession and property in letters put into such letter-box acquired, and according to what principles? The like question arises in relation to boxes for offerings in churches and public places, the poor-boxes put up in places to which the public resort.

23. Where letters are addressed *poste restante* must the Post Office satisfy itself of the identity of the person asking for them? Will the production of a visiting-card or an addressed post-card be enough for this purpose? What would be the result if the Post Office demanded strict legal proof of identity? What ought to be taken as the presumable intention of the sender in this respect?

24. What liability does the Post Office undertake in receiving a letter declared to contain money<sup>1</sup>? Is it liable for the sum declared if it is not found in it when opened? 25. What has the addressee to do if the letter shows signs of having been tampered with? 26. Is it of importance for his claim against the Post Office if he takes the precaution to open the letter, delivered to him intact, in the presence of the postman? 27. Is there not a precaution which the sender moreover will do well to observe when sealing up the money?

<sup>1</sup> Such declarations are not known in practice in Great Britain. By the Post Office Statutes of Great Britain no action can be brought against the Post Office, as represented by the Postmaster-General, for money lost in transmission through the post.

28. The arrangements<sup>1</sup> which have existed for some time for payments through the post exempt the sender from these precautionary measures, at least for small sums; what is the legal character of these arrangements? Does the person who pays in the sum deposit it with an adjected agreement that it shall be paid out to the addressee? Is it a mandate in favour of a third party?

29. For establishing the identity of the addressee does the same rule apply here as in No. 23?

30. How is an advance of money by the post in respect of a package handed over to it to be characterized in a legal sense? As a *mutuum* for which the post has security that it will be repaid by the addressee? Under what point of view does the receipt of the package by the latter, against payment, fall? Is it on all fours with the payment by him of unpaid postage? If acceptance is refused, from what legal standpoint will the claim of the Post Office for repayment of the money advanced have to be brought?

31. A creditor duns his debtor by means of a correspondence card, in a manner which cannot of itself be said to contain in it any personal injury; can one be found to exist in the mere fact that it was done by a correspondence card? The sender sets up that such a card is intended solely for the addressee; if others, e.g. the postman, the servants, have read it, that does not concern him, it is an unavoidable consequence of its form which he has nothing to do with.

32. In transactions by letter when is a contract binding on the offerer? At the moment when the acceptor has written the letter of acceptance? or

<sup>1</sup> e. g. Post Office Orders and Postal Orders.

posted it ? or when it reaches the offerer ? or is opened by him ?

33. Can the acceptor after dispatch of his letter still recall it effectually ?

34. Is it a sound proposition that the contract, so long as it is not binding on the acceptor, cannot be binding on the offerer, or is not a partial effectiveness of a contract conceivable so that only one of the parties is bound and not the other ?

35. A person has ordered from a foreign tailor, from whom he gets his clothes, a new coat 'just the same as the last one,' or cigars from a cigar dealer ; neither of them answer ; is the contract completed, or can the person giving the order disclaim the fulfilment of it by the other party on the ground that there has been no acceptance of the order ?

36. In what way is this case distinguishable from that which occurs where some one writes to a person at a distance that he is disposed to buy his house for £1,500 ?

37. In what position legally are postal parcels where neither the sender nor addressee are to be found ? May they be regarded as without an owner like *thesaurus* ? According to postal regulations<sup>1</sup> they are, after the lapse of a certain time, to be auctioned, and the proceeds go to a charitable fund of the Post Office. Is it necessary in order to put this regulation on a legal foundation to admit a previous absence of ownership of the things ?

37 a. Through the breaking of a bottle of olive-oil delivered by A for transmission by post several parcels in the post were damaged. Must the Post Office pay

<sup>1</sup> i. e. in Germany. The English Post Office has different regulations.



damages to the senders of these parcels, or can it refer them to A<sup>1</sup>? Have the senders to bring evidence that the breakage of the bottle was due to the fault of an official of the post? Can the Post Office claim relief against A? Is *culpa* of the latter in relation to the packing to be presumed, or must it be proved?

<sup>1</sup> See *supra*, No. 9.

## XX

### IN A FOREIGN COUNTRY

1. **SPEAKING** generally, is absence abroad of importance in Roman law as regards legal rights and duties? 2. Has it any effect upon possession? 3. Can a creditor, on the ground of his debtor's absence or his own, claim restitution of his right to the debt, notwithstanding his right of action is prescribed? 4. Can a former owner on the like ground (absence of himself or of the possessor) demand restitution of the property notwithstanding usucaption? 5. Does the absent person by Roman law require a *restitutio in integrum* in order to recover an inheritance which he has failed for twenty years to enter upon owing to ignorance of its having devolved on him? 6. What ought the Court to have done when the delation of the inheritance occurred? 7. May it, after all inquiries as to his existence and residence have proved fruitless, treat him as dead, and hand over the inheritance to those next entitled?

8. Can a *procurator omnium bonorum* appointed by the absent person enter upon the inheritance that has fallen to the latter, or how can he otherwise in the case contemplated protect his interests? 9. Can he claim a legacy left to his absent principal? 10. Must he in both cases prove that the absentee is alive at the time? 11. If, failing such *procurator*, the heir has deposited the legacy in the hands of the Court or

at a banker's, by what action can the absent person afterwards claim it?

12. The absent person desires to make a will in the foreign country; may he do so in conformity with the laws of the place? 13. If he dies there intestate, according to what laws is his succession determined? 14. He had already taken the necessary steps to get himself naturalized there, but when the letters of naturalization arrive he is dead; is this of importance for the preceding question? 15. He enters into a marriage in the foreign country with a person whom, according to the laws of the place though not according to his own laws, he cannot marry (e.g. a Christian with a Jewess); will the marriage be recognized by his native Courts as valid after his return? 16. Does the question whether the children born of this marriage are to be regarded as legitimate or illegitimate depend as a matter of course upon the previous decision?

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## XXI

### ALL KINDS OF QUESTIONS

1. THE firewood necessary for boiling the brine at a salt factory is cut down at an upland forest belonging to the factory, and there thrown into a stream by which it is carried along until caught by a weir erected at the salt works. What is the position of the timber, as regards its possession, during this period of transit? 1 *a*. Does the rule applicable to possession in this case apply also when a stream in flood has overflowed its banks and carried away objects lying there? 1 *b*. If a person drags such objects out, is his act to be judged in the same light as that of one who drags out the firewood?

2. A wood merchant has bought a large quantity of old railway sleepers and has them cut into pieces, which are obtained from him by poor people for firewood at a cheap price. It appears that they will not burn owing to the sleepers having been saturated<sup>1</sup>. Must he take the pieces back? He refuses on the ground that he has not expressly sold them as firewood, and the low price should have made the buyers aware that they were dealing with wood in an exceptional condition. Any other use of the wood than that of burning is not suggested.

3. A poor peasant girl who has beautiful hair offers it for sale to a hairdresser, and they come to terms by which it is agreed that the hair shall be allowed to grow for a month longer. In the interval the girl

<sup>1</sup> i. e. with some non-combustible substance.

becomes engaged and her betrothed will not consent to her having her hair cut off. The hairdresser stands upon the contract, and asks that judgment be given ordering the girl to allow the hair to be cut, and, failing her doing so, to pay double the stipulated price as damages, as it can be shown that the hair is worth this commercially—a fact which cannot be disputed. On the other side the defence is set up that parts of the human body cannot be objects of trade, they form part of a man in his bodily manifestation, they belong to the *res extra commercium*. The plaintiff disputes this, because human hair is sold daily, and property in it is just as undoubted as in the skeletons and preserved specimens in an anatomical collection. How should the question be decided?

4. In New York the following similar case came up for judgment in the Courts. A pupil and enthusiastic admirer of a certain phrenologist there bequeathed to him by her will her skull for the purpose of phrenological studies, the heirs refused to carry out the will, the legatee insisted that it should be given effect to; what should be the decision?

5. A dentist has prepared a set of artificial teeth for a married lady belonging to the upper ranks of society, and, after her death, demands payment from the husband on the ground of a statutory rule that the husband is bound to provide for the wife 'maintenance suitable to her position.' The husband disputes his obligation because false teeth do not fall under the head of suitable maintenance, he may be bound to pay the physician who attends his wife in an illness, but not a dentist whose operations in this case were not clinical but purely for personal adornment. How should the decision go?

6. A dentist extracts a wrong tooth ; can the patient sue for damages (*solatium* for pain—insertion of a new tooth—interest of personal affection, *affection-interestee*<sup>1</sup>) ?

7. A lady living in the upper flat has called in a doctor, a lady in the lower flat waylays him and consults him about herself. She refuses to pay him a fee on the ground that she has not called him in and so has not had any visit from him.

8. In a railway train a patient, who is on his way to a spa, enters into conversation with a gentleman, who is unknown to him, and tells him of his intention. The latter, who is a distinguished clinical doctor, obtains from him an exact explanation of his symptoms, and in the end advises him not to go to the bath-resort he has chosen, which is quite unsuited for him, but to another in the neighbourhood which he names ; the patient follows this advice. Does any claim for a fee here arise ?

9. A son-in-law, who is a lawyer settled at a place remote from his father-in-law, gives the latter, on his request, advice by letter on a legal affair ; would he be entitled to demand a fee for this ? Would a professor of law, whom one of his students asks for advice on a legal matter which affects him ?

10. Do any legal consequences arise in respect of parcels of coin issued by bankers, sealed and marked with their names and indicating the amount contained therein, that is to say, can the present holder, into whose hands one of the parcels has come, make a claim against the banker if there is a deficiency in the amount, on the ground of the assurance given on

<sup>1</sup> See l. 33 *pr. ad leg. Aquil.* (D. 9. 2).

the parcel, or must each person, who receives such, go against the person he got it from?

11. How are we to define legally transactions with automatic machines set up in public places, which, in return for putting into the slot a specified coin, tells the weight of a person mounting on the step of the apparatus, or provides him with a cigar, a tablet of chocolate, or other goods? When does the man who has set up the apparatus acquire possession and property of the piece of money dropped into it? Is there here a contract with an absent person? If this is to be answered affirmatively, what contract is there in the given cases? May the setting-up of the apparatus be regarded from the point of view of a general offer—a public invitation to contract—a proposal of a contract? By what action can the coin dropped in be demanded back if the apparatus is no longer in working order? Is an action for specific performance, or an action in respect of latent faults in the goods delivered, competent against the person who sets up the machine?

12<sup>1</sup>. Does a photographer acquire property in a plate not belonging to him, which he uses for taking a photograph? May he exhibit in his show window or sell the photograph of a customer without his permission<sup>2</sup>? A customer, who is being photographed, sees at the photographer's photographs of children which greatly please him, and declares that he will shortly bring his own children to be taken by him, but afterwards gives another photographer the preference; might he do this?

<sup>1</sup> The latter part of this question is omitted, in conformity with 12th ed., No. 14.

<sup>2</sup> See *Pollard v. Photographic Co.* (1888), 40 Ch. Div. 345; *Boucas v. Cooke* (1903), 2 K. B. 227.

13. A person requests a painter to make for him a copy of an original painting which is in the local picture gallery. After this has been nearly got ready it is destroyed by a fire that broke out in the gallery. Can the painter demand to be recompensed for the labour that has occupied him weeks? Was there here a sale of a future thing or a *locatio conductio operis*? If the former, the painter can claim nothing, if the latter, the money value of his labour. Is the circumstance that he supplies the canvas and the paints decisive in favour of a sale? If the answer to this is affirmative, what advice should be given to a painter who has undertaken to make a copy or to take any one's portrait?

14. From what legal point of view should painting be regarded? Have the Roman jurists taken the right view in applying to it the notion of accession? Is a painting merely a canvas covered with colours, so that the property in the colours falls to the owner of the canvas?

15. A rich man, who was originally a poor orphan boy, is accustomed to invite the whole of the children in the local Orphanage to his country residence on his birthday. There they are first given refreshments, then follows a hunt after objects hidden in his park—hard-boiled eggs, fruit, toys, even some watches, which go to whoever finds them. How is this occurrence to be described legally: as an offer, occupation of ownerless objects, tradition to a *persona incerta*? Assume that there had been mingled among the orphan children a child not belonging to the Institution, or that one of the articles not picked up was afterwards discovered by a workman employed in the park. Would the things found by



such persons belong to them? Should this question in view of the intention of the originator of the feast, have to be answered negatively, what does it imply as regards the juristic character of the above occurrence?

16. At country sports it is common to find a row of climbing-poles set up, smeared with soap, upon the top of each of which a watch or some other article of value is placed, which is a prize for whoever brings it down. Is there any known legal conception which we can hold to apply to the state of facts here described, or must a new one be set up for it?

17. A visitor at a sea-bathing place shoots on the shore a gull, which falls into the sea and is picked up by a person who is in a boat close by; to whom does it belong; to him who shot it but was not in a position to get it out of the waves, or to him who has appropriated it?

18. An article has fallen out of a passing boat into a net that happened to be set at the place; has the person who set the net acquired the possession of the article? Does the same rule apply to it as to the fish that have got into the net? Does the person who has let the article fall commit an illegal act in himself pulling it out of the net again? Would it be the same should he take fish out of the net?

18 a. In emptying the net a fish has leaped into the water again, and a boy bathing at the place seizes it; does the fish belong to him?

19. Has the member of a club, which has become incorporated as a juristic person, a right of action in case of his being hindered in the enjoyment of the privileges accorded by the bye-laws to the individual members, e. g. the use of the club-room, the library,

the billiard-table? The club servant, who has filled this post for a long time and through indulgence of the committee has become spoiled, is, before a certain hour in the morning and after a certain hour in the evening, in the habit of refusing to perform duties, incumbent upon him, for individual members who then come in, and the committee, whose repeated representations have remained fruitless, is loth to proceed against him with severity. Would an action by those members against the committee or the servant not be barred by the circumstance that rights for single members within the corporate body are impossible, as all rights are appropriated to the juristic person itself?

20. By contract the landlord, in whose premises the club meets, has permission to let the club hall and adjoining rooms for festivities, e. g. weddings, balls, concerts, and public lectures, in a manner not inconsistent with the object for which the premises have been destined. He has arranged for artisan balls to be given in it, hitherto held only in restaurants of inferior character, and in consequence thereof the committee has claimed to end the contract before the term agreed on. Is it within its right in doing so? The club had been a rendezvous for so-called people of quality, between whom and the artisan classes there is a distinct line of demarcation.

21. The wine is handed over to the club landlord by the committee, and he has to serve it to the members at a fixed price, of which he is to receive a specified proportion. How is this legal relation to be described? Does the landlord buy the wine from the committee, and do the members again buy it from him, or does he merely act as agent, subject to

a specified commission on the sale by the committee to the members? Assuming that the wine is destroyed in the cellar through *casus*, e.g. owing to the cellar being flooded by water, who must bear the loss? The contract affords no assistance towards answering the question, it bears simply: 'the wine will be delivered to the landlord by the committee and he must adhere to the prices fixed for it.'

21 a. If the landlord gives credit he does so at his own risk. Can we regard it as a case of giving credit if he delivered to a member wine ordered by him which this member, who perhaps has forgotten his purse, does not pay for forthwith? If the sum is not paid, who has to bear the loss, the landlord or the club committee?

22. A tenant will not at the end of his term leave the dwelling he hired, and the landlord, in order to compel him, takes off the doors and windows; is he entitled to do this? According to Roman law does the landlord act illegally in this case<sup>1</sup>?

23. Can an employer take away a thing by force from a servant girl, which the latter received on his behalf and refuses to give up? Would this be a case of unlawful self-help?

24. A person hires through a registry woman a servant girl from a distance, can the girl claim the cost of the journey? If one obtains things from a distance is there any doubt that he must pay the costs of transmission? is this not applicable also to the expenses of the journey of the servant girl, or if not wherein lies the difference<sup>2</sup>?

<sup>1</sup> Part of this question is omitted as relating purely to a point of German Statute law.

<sup>2</sup> For the remainder of this question see ante, IV, No. 45.

25. In a district where judicial intimation of terminating a tenancy has to be given the tenant has made a mistake in the notice as regards the Christian name of the lessor, but the judicial notice is correctly delivered. The lessor afterwards disputes its binding force in law, on the ground that the notice bore to be to another person than to him, that it is invalid in respect of error in the person.

26. A testamentary heir sells a mass of manuscript papers to a grocer, who uses them for wrapping up things. Among them are letters of various persons to the testator of a confidential character. Can the writers of the letters or their representatives raise an action against him? His contention is that the testator (and he himself through him) became owner of the letters, and he can consequently sell them<sup>1</sup>.

27. A stranger who has taken a ticket in the Leipsic lottery attends, during his stay in Leipsic, the drawing of the numbers. Hearing the number next after his called out for a prize, he immediately sets off and inquires of the lottery agent from whom he got his ticket whether the number following the one he bought is still to be had, and as this is the case he buys it. Can the agent challenge the sale? On what grounds presumably? 27 a. The holder of a lottery ticket sells it to another person after the drawing had taken place, without either of them having notice of the fact. Can the seller challenge the sale, if it was a winning number, or the buyer, if it was a blank? Is it necessary for this purpose

<sup>1</sup> As to property of private letters in English law see the case of Lord Chesterfield's *Letters to his Son*, against the publication of which an injunction was originally obtained by his executors—*Thompson v. Stanhope*, Amb. 737; Copinger on Copyright, pp. 24-30; see ante, XIX, No. 15.

to take into consideration the principles of *laesio enormis*? 27 b. How, if both parties knew that the drawing had taken place, but did not yet know the result? Might one here speak of an *emptio spei*?

28. A merchant who had business relations with a large outfitting establishment which supplied trousseaux, and which at the moment was about to supply one to a princely personage, gives to an acquaintance, who wishes to look at it, his visiting-card, on which he writes: 'Messrs. X & Co. I beg you will comply with the wish of Mr. Z, who is the bearer of this.' This card was stolen, along with the pocket-book in which it had been put, and was presented by an impostor to the addressee, accompanied by an order for delivery of a considerable quantity of linen goods, which order was duly implemented. Has the person who gave the card to pay the amount of the account? The author remembers a similar case in his own experience. A club waiter, who had during a long period waited on one of the author's acquaintances at dinner, but had been recently summarily dismissed, came to him begging for money to pay his fare home. The person applied to having no small change, but hearing from the waiter that he intended to make the same request to one of his friends, wrote a letter, which he did not close and to which he appended no address, in the following terms: 'Dear Friend, give the waiter Louis, who has been summarily dismissed, and to whom you will also yourself doubtless make some contribution, five shillings on my account to meet the cost of his journey home, I have at this moment no small change. Yours X.' The waiter goes with this note to every one of the friends of the writer, each of whom, in addition to his own

gift, gives to him five shillings on behalf of  $X$ ; must  $X$  make it up to them?

29. Similar cases of fraud also occur with private telephones, unauthorized persons making use of them in the absence of the occupier of the house, e.g. for giving an order to a tradesman, an order to a banker to make a payment; is the occupier of the house liable?

30. The following case, which reminds one of the ring of Polycrates, I extract from a newspaper: 'In the stomach of a goose, purchased from a market-woman, a sovereign was recently found on its being killed. The seller, who by chance heard of it, came immediately to the buyer and demanded that the coin should be given up, that it had been swallowed by the goose while still in her possession. At the same time, however, the farmer, on whose farm this poor market-woman lived, raised objection to the money being handed over to her, as he had lost a sovereign in his yard, and further stating that he did not at all believe that she had a sovereign in her possession. Finally, the buyer also maintained that he had a claim to the discovered coin, because with the goose he acquired everything that it carried in its inside.'

30 a. Another newspaper mentions the following case: 'Some years ago there died in Schleswig the Royal Military Councillor Nielsen, who was generally known as a misogynist. Before his death he bequeathed to his manservant and his cook 20,000 Kronen each absolutely, subject to the proviso that as soon as either of them married his or her share of the succession should pass to the other. No sooner was the Councillor dead than the two legatees made all haste

to unite themselves in the bonds of holy matrimony; the newly married couple then went to Hamburg, where they have had for the last six years their residence. Recently the relatives of Military Councillor Nielsen, living in Copenhagen, having learned that the legatees had married, demanded the immediate repayment of the 40,000 Kronen, because by the marriage the provision of the will had been violated. The former manservant and the former cook, on the other hand, asserted that they had fully conformed to their obligations, because he (the manservant) when he married had in effect handed over his 20,000 Kronen to the cook, and the latter likewise had handed over her share of the succession to the manservant, in accordance with the proviso.' What decision should be given?

30 b. A swindler makes use of my calling-card in order, by presenting it to a business firm to whom I have given an order for goods, to prove that he was empowered by me to get away the goods. Do I bear the loss on the ground that I should have taken care that my calling-cards did not get into wrong hands, or the owner of the business, because he ought not to have delivered the article in reliance on a mere calling-card?

30 c. How is the position of bouquets of flowers placed on graves to be defined in law? Are they without an owner? Then can any one take them? The question some time ago received a practical illustration in connexion with General Boulanger's death in Brussels. His admirers there undid the satin bows from the bouquets in order to cut them into slips and send these as relics to his admirers abroad. The question is here put for decision solely according to Roman law. Did their manner of acting fall under

the Roman notion of *furtum*, or is not the circumstance that the things were abandoned opposed to this, or, even if this is not admitted, is there not wanting on their part the *animus lucri faciendi*?

BY THE TRANSLATOR.

[31. By the authorized bye-laws of a Tramway Company passengers on the top of a car are made liable to a penalty if they do not sit down while the car is in motion. On a wet night, when the inside of the car was full of passengers, *A* went on the top, but the seats being unprotected by covers and very wet he did not sit down. The bye-laws were not in any way brought to his notice. Owing to negligent driving the car experienced a violent jolt, and *A* was thrown off and seriously injured. In an action by him he is met by a plea of contributory negligence. Is this plea a sound one? Could *A* in the circumstances be sued for a penalty for breach of the bye-laws?

32. The following case occurred in the translator's own experience. *A* and *B*, two friends, hire horses in order to take a ride together. *A* hires from a horse-dealer *X*, who is aware of the intended joint ride, while *B* hires from a horsedealer *Y*. In the course of the ride *A*'s horse, having been struck by him lightly with the whip, kicked out and struck the other horse and broke its leg. It turned out that *A*'s horse had a vice of kicking when struck with a whip, but this, though known to its owner *X*, was unknown to *A* or *B*. On whom should liability for the damage fall? There are four possible alternatives that may be conceived.



33<sup>1</sup>. At a railway station in India there was erected an automatic machine for telling persons their weights, in return for a penny put into the slot in the ordinary way. An enormously stout person, weighing considerably over twenty stone, got upon the step, after putting in a penny, and the mechanism broke with his weight. The owner of the machine claimed compensation for the damage, and the other party demanded the return of his penny. Could either of them succeed with his claim?

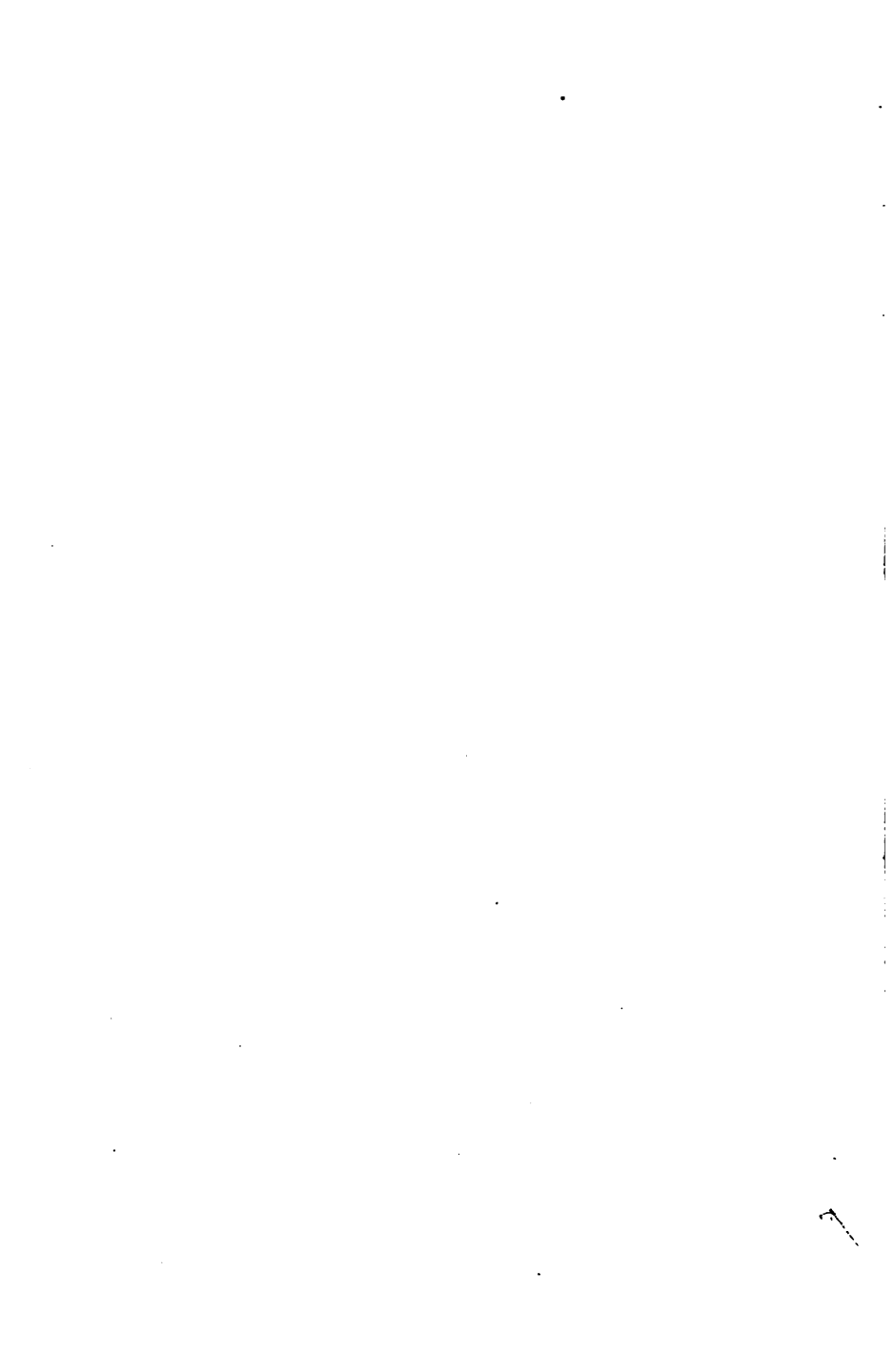
34. If a person has taken a photographic snapshot of another, does the copyright of the negative belong to him? Is he liable in damages if he publish reproductions of the photograph? Supposing it is a public personage who has been 'snapped,' say, while bathing or during sea-sickness?

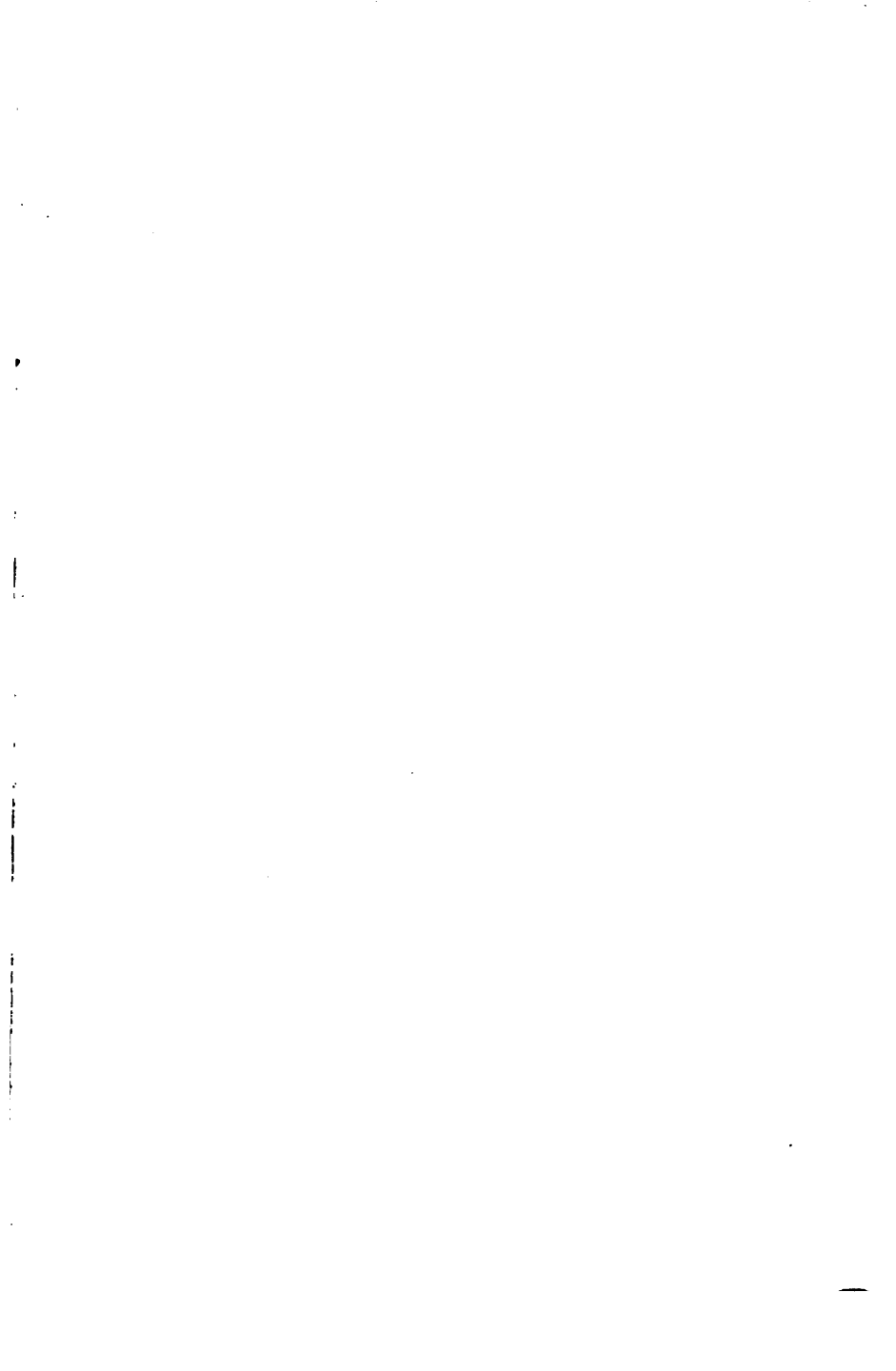
35. The following case was recently reported in an English newspaper. A youth, aged eighteen, feeling ill went to a public hospital to have himself examined, and was there supplied by one of the hospital doctors with a simple remedy, and told to call again. Feeling worse, and a rash having broken out on his body, he returned soon after and was given some ointment. His father ultimately becoming alarmed called in a doctor, who pronounced the case to be one of small-pox. Soon afterwards the disease was caught from him by three of his younger brothers, and all of them had to be removed to hospital. As a consequence the father's business,—he was a handicraftsman,—in which they were all employed, had to be suspended. Had the father an action against the hospital doctor, and what would be the measure of damages?]

<sup>1</sup> The translator is indebted for this question to his friend Sir Charles Roe, late Chief Justice of the Punjab.

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